

(12)  
No. 96-1569-CFX  
Status: GRANTED

Title: Daniel Bogan and Marilyn Roderick, Petitioners  
v.  
Janet Scott-Harris

Docketed:  
April 4, 1997

Court: United States Court of Appeals for  
the First Circuit

Counsel for petitioner: Assad, Bruce A., Shirley, Thomas E.

Counsel for respondent: Schwartz, Harvey A., Fulton, Stephen  
C.

Entry	Date	Note	Proceedings and Orders
1	Apr 4 1997	G	Petition for writ of certiorari filed. (Response due May 4, 1997)
2	May 5 1997		Brief of respondent Janet Scott-Harris in opposition filed.
3	May 20 1997		DISTRIBUTED. June 5, 1997 (Page 2)
4	Jun 9 1997		Petition GRANTED. In addition to the questions presented by the petition, the parties are directed to brief and argue the following question: Are individual members of a local legislative body entitled to absolute immunity from liability under 42 U.S.C. Sec. 1983 for actions taken in a legislative capacity? SET FOR ARGUMENT December 3, 1997. *****
6	Jul 1 1997		Order extending time to file brief of petitioner on the merits until August 14, 1997.
8	Aug 13 1997		Order extending time to file brief of respondent on the merits until October 6, 1997.
9	Aug 14 1997		Joint appendix filed.
10	Aug 14 1997		Brief of petitioners Daniel Bogan and Marilyn Roderick filed.
11	Aug 14 1997		Brief amici curiae of Massachusetts Municipal Association, et al. filed.
12	Aug 14 1997		Brief amici curiae of National League of Cities, et al. filed.
13	Aug 14 1997		Brief amicus curiae of City of Fall River, Massachusetts filed.
14	Oct 6 1997		Brief of respondent Janet Scott-Harris filed.
15	Oct 31 1997		CIRCULATED.
18	Nov 7 1997	X	Reply brief of petitioners Daniel Bogan and Marilyn Roderick filed.
16	Nov 10 1997		Record filed.
		*	Record proceedings U.S. Court of Appeals for the First Circuit.
17	Nov 10 1997	D	Motion of Westboro Baptist Church for leave to file a brief as amicus curiae filed.
19	Nov 17 1997		Motion of Westboro Baptist Church for leave to file a brief as amicus curiae DENIED.
20	Nov 25 1997	X	Supplemental brief of petitioners filed.
21	Dec 3 1997		ARGUED.

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No. ~~OFFICE OF THE CLERK~~

In The  
**Supreme Court of the United States**  
October Term, 1996

DANIEL BOGAN AND MARILYN RODERICK,  
*Petitioners,*  
versus

JANET SCOTT-HARRIS,  
*Respondent.*

**Petition For Writ Of Certiorari  
To The United States Court Of Appeals  
For The First Circuit**

**PETITION FOR CERTIORARI**

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113 pp



**QUESTIONS PRESENTED**

Whether the First Circuit Court of Appeals erred in affirming the denial of the individual defendants' motions for judgment notwithstanding the verdict on the grounds that, in conflict with this Court and the majority of other circuit courts, it determined that absolute legislative immunity was unavailable to municipal officials as a defense to an action pursuant to 42 U.S.C. § 1983, because of their improper motives and even though the municipal officials challenged actions are quintessentially legislative, *i.e.*, the enactment of a local government budget?

Whether the First Circuit Court of Appeals erred in holding that the individual municipal officials proximately caused the Plaintiff injury pursuant to 42 U.S.C. § 1983, even though the official municipal decision maker acted for lawful reasons to enact a lawful municipal budgetary ordinance?

### LISTING OF ALL THE PARTIES

Undersigned counsel for Petitioners, Daniel Bogan and Marilyn Roderick, provide the following list of parties as required by Supreme Court Rule 14(b):

1. Petitioner Daniel Bogan was a defendant in the proceedings in the District Court for the District of Massachusetts and an appellant before the United States Court of Appeals for the First Circuit.
2. Petitioner Marilyn Roderick was a defendant in the proceedings in the District Court for the District of Massachusetts and an appellant before the United States Court of Appeals for the First Circuit.
3. The City of Fall River, Massachusetts, a municipal corporation duly incorporated under the laws of the Commonwealth of Massachusetts, was a defendant in the proceedings in the District Court for the District of Massachusetts and an appellant before the United States Court of Appeals for the First Circuit. The City is not a petitioner.
4. Respondent Janet Scott-Harris was the plaintiff in the proceedings in the District Court for the District of Massachusetts and the appellee before the United States Court of Appeals for the First Circuit.
5. A number of other defendants in the proceedings in the District Court for the District of Massachusetts were dismissed at various points prior to the appeal.

### LISTING OF ALL THE PARTIES - Continued

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## TABLE OF CONTENTS

	Page
Questions Presented .....	i
Listing of All the Parties .....	ii
Table of Contents.....	iv
Table of Authorities .....	v
Opinions Below .....	1
Statement of Jurisdiction.....	1
Constitutional Treaty or Statutory Provisions.....	2
Statement of the Case .....	2
A. Factual Background .....	2
B. The Proceedings Below .....	6
1. The District Court Decision .....	6
2. The First Circuit Opinion .....	8
Reasons for Granting the Writ.....	11
I. The Decision of the First Circuit Regarding the Applicability of Absolute Legislative Immunity to the Actions of Municipal Officials Conflicts With the Opinions of this Court and Other Federal Appellate Courts .....	11
II. The Decision of the First Circuit Raises an Issue of Substantial Importance Regarding Individual Liability of Legislators Pursuant to 42 U.S.C. § 1983.....	22
Conclusion .....	27
Appendix A .....	App. 1
Appendix B .....	App. 34
Appendix C .....	App. 75
Appendix D .....	App. 76

## TABLE OF AUTHORITIES

	Page
CASES	
<i>Acevedo-Cordero v. Cordero-Santiago</i> , 958 F.2d 20 (1st Cir. 1992) .....	12, 19, 19 n.5
<i>Aitchison v. Raffiani</i> , 708 F.2d 96 (3d Cir. 1983) .....	12, 13, 15, 19 n.4, 20 n.8
<i>Alexander v. Holden</i> , 66 F.3d 62 (4th Cir. 1995) .....	11, 13
<i>Arnold v. Int'l Business Machines, Corp.</i> , 637 F.2d 1350 (9th Cir. 1981).....	23
<i>Berkley v. Common Council of City of Charleston</i> , 63 F.3d 295 (4th Cir. 1995), <i>cert. denied</i> , 116 S. Ct. 775 (1996).....	14
<i>Bruce v. Riddle</i> , 631 F.2d 272 (4th Cir. 1980) ..	12, 20 n.8
<i>Carver v. Foerster</i> , 102 F.3d 96 (3d Cir. 1996) ..	13, 16 n.3
<i>Cutting v. Muzzey</i> , 724 F.2d 259 (1st Cir. 1984)....	12, 19
<i>Ditch v. Bd. of County Comm'rs</i> , 650 F. Supp. 1245 (D. Kan. 1986), <i>amended on other grounds</i> , 669 F. Supp. 1553 (D. Kan. 1987) .....	14
<i>Drayton v. Mayor &amp; Council of Rockville</i> , 699 F. Supp. 1155 (D. Md. 1988), <i>aff'd</i> , 885 F.2d 864 (4th Cir. 1989) .....	13, 20-21 n.8
<i>Dusanenko v. Maloney</i> , 560 F. Supp. 822 (S.D.N.Y. 1983), <i>aff'd</i> , 726 F.2d 82 (2d Cir. 1984).....	14
<i>Espanola Way Corp. v. Meyerson</i> , 690 F.2d 827 (11th Cir. 1982), <i>cert. denied</i> , 460 U.S. 1039 (1983) .....	12
<i>Forrester v. White</i> , 484 U.S. 219 (1988) .....	11

## TABLE OF AUTHORITIES – Continued

	Page
<i>Furtado v. Bishop</i> , 604 F.2d 80 (1st Cir. 1979), <i>cert. denied</i> , 444 U.S. 1035 (1980).....	23
<i>Goldberg v. Rocky Hill</i> , 973 F.2d 70 (2d Cir. 1992) ....	12
<i>Goldberg v. Spring Valley</i> , 538 F. Supp. 646 (S.D.N.Y. 1982).....	14
<i>Gorman Towers v. Bogoslavsky</i> , 626 F.2d 607 (8th Cir. 1980).....	12
<i>Gross v. Winter</i> , 876 F.2d 165 (D.C. Cir. 1989).....	13
<i>Haskell v. Washington Township</i> , 864 F.2d 1266 (6th Cir. 1988) .....	12
<i>Herbst v. Daukas</i> , 701 F. Supp. 964 (D. Conn. 1988) ....	13
<i>Hernandez v. Laffayette</i> , 643 F.2d 1188 (5th Cir. 1981), <i>cert. denied</i> , 455 U.S. 907 (1982).....	12
<i>Hughes v. Tarrant County, Tex.</i> , 948 F.2d 918 (5th Cir. 1991) .....	12
<i>Kuzinich v. County of Santa Clara</i> , 689 F.2d 1345 (9th Cir. 1982).....	12
<i>Lake County Estates v. Tahoe Regional Planning Agency</i> , 440 U.S. 391 (1979).....	17, 19 n.4
<i>Leatherman v. Tarrant County Narcotics and Intelligence Coordination Unit</i> , 507 U.S. 163 (1993) ..	18 n.4
<i>Monell v. New York City Dep't of Social Services</i> , 436 U.S. 658 (1978) .....	19 n.4
<i>Rabkin v. Dean</i> , 856 F. Supp. 543 (N.D. Cal. 1994) ...	13, 16
<i>Racine v. Cecil County</i> , 843 F. Supp. 53 (D. Md. 1994).....	13

## TABLE OF AUTHORITIES – Continued

	Page
<i>Rateree v. Rockett</i> , 852 F.2d 946 (7th Cir. 1988) .....	13, 14, 15, 19 n.4, 20 n.8
<i>Reed v. Shorewood</i> , 704 F.2d 943 (7th Cir. 1983).....	12
<i>Roberson v. Mullins</i> , 29 F.3d 133 (4th Cir. 1994) .....	13
<i>Ryan v. Burlington County, NJ</i> , 889 F.2d 1286 (3d Cir. 1989) .....	12
<i>Springer v. Seamen</i> , 821 F.2d 871 (1st Cir. 1987) .....	23
<i>Supreme Ct. of Va. v. Consumers Union</i> , 446 U.S. 719 (1980) .....	18, 19-20 n.6
<i>Tenney v. Brandhove</i> , 341 U.S. 367 (1951).....	17, 20
<i>Wagenmann v. Adams</i> , 829 F.2d 196 (1st Cir. 1987) ....	23
STATUTES AND RULES	
28 U.S.C. § 1254(1) .....	1
28 U.S.C. § 1331.....	6
28 U.S.C. § 1343(3) .....	6
28 U.S.C. § 1367.....	6 n.1
42 U.S.C. § 1981.....	6
42 U.S.C. § 1983.....	2, 6, 22, 23
Mass. Gen. L. c. 93, § 102 .....	6 n.1
Sup. Ct. R. 10 .....	16, 21, 26
Sup. Ct. R. 14(b) .....	ii
UNITED STATES CONSTITUTION	
First Amendment.....	2, 6



**PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT**

The Petitioners, Daniel Bogan and Marilyn Roderick, respectfully pray that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding January 15, 1997.

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**OPINIONS BELOW**

The opinion of the United States District Court for the District of Massachusetts, Hon. Patricia Saris, presiding, is unreported but a copy of the Order denying Defendants' motions for judgment notwithstanding the verdict is appended to this Petition as Appendix A. The opinion of the Court of Appeals for the First Circuit is not yet reported, but a copy of the slip opinion is reproduced in the Appendix as Appendix B. Judgment of the District Court is attached as Appendix C and the First Circuit denial of rehearing is attached as Appendix D.

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**STATEMENT OF JURISDICTION**

The opinion of the Court of Appeals for the First Circuit was published on January 15, 1997. A timely petition for rehearing was denied February 24, 1997. The First Circuit entered judgment on January 15, 1997, and its mandate was stayed on March 7, 1997. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

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## CONSTITUTIONAL TREATY OR STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.

Section 1983 of Title 42, Chapter 21 of the United States Code provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

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### STATEMENT OF THE CASE

#### A. The Factual Background.

The City of Fall River is governed by a mayor and city council which consists of nine councillors. The City's

fiscal year runs July 1 through June 30. Pursuant to the City's Charter, municipal ordinances may be passed upon proposal by the Mayor and a favorable vote of the majority of the city councillors. In 1987, the Mayor and majority of the City Council enacted an ordinance establishing the Department of Health and Human Services ("DHHS") for the City of Fall River. DHHS was established to oversee pre-existing city departments, including the Public Health Department, the Council on Aging, the Veterans' Agent, and the Buildings and Code Enforcement department. The ordinance required that these departments report to the Administrator of DHHS who would in turn report to the City Administrator.

Janet Scott-Harris, an African-American woman, was selected as the Administrator of DHHS in 1987, at an annual salary of \$48,000. During the course of her tenure as Administrator of DHHS, Scott-Harris performed well, but experienced ongoing conflict with and hostility from another city employee, Ms. Dorothy Biltcliffe. Ms. Biltcliffe was employed at the Council on Aging and Scott-Harris had heard Ms. Biltcliffe use racially charged language, including referring to Scott-Harris as a "black nigger bitch" and another African-American employee as "little black bitch." After consulting with Mr. Robert Connors, the City Administrator, Scott-Harris filed a complaint against Ms. Biltcliffe, based on this conduct. Ms. Biltcliffe threatened to use her "influence" in response to the charges. She contacted several people, including Ms. Marilyn Roderick, a City Councillor and chair-person of the ordinance committee.

A hearing on the charges was scheduled and on the day of the hearing, at which Scott-Harris was not present,



Ms. Biltcliffe proposed a settlement of the complaint which included a sixty (60) day suspension. The settlement was accepted by the attorney present on behalf of Scott-Harris and Ms. Biltcliffe was suspended without pay for sixty (60) days. Ms. Biltcliffe's suspension was later reduced by Mr. Bogan, after he became acting Mayor.

In December 1990, the Mayor of Fall River resigned to accept another position. Mr. Daniel Bogan, as president of the City Council, became acting Mayor of the City of Fall River. In January 1991, in preparation for the 1992 Fiscal Year Budget, Mayor Bogan and Mr. Connors requested the various city departments to submit budget proposals which included a 10% decrease in expenses from the previous fiscal year due to the anticipated decline in state aid to the City for 1992. Scott-Harris submitted a budget for DHHS with a proposal to reduce the department's budget through the elimination of vacant positions and reducing nursing services in schools and senior centers.

After receiving the budget proposals, Mr. Connors presented Mayor Bogan with options for reducing the 1992 budget: (1) reduce expenses; (2) reduce capital outlays; and/or (3) reduce personnel. Additionally, Mr. Connors provided Mayor Bogan with a list of vacant positions. In response, Mayor Bogan requested a list of all temporary positions, provisional positions, positions not under contract, positions not protected by Civil Service and positions which had no impact on "front line" service. Mr. Connors provided Mayor Bogan with this list which included Scott-Harris' position as Administrator of DHHS.

In conjunction with other cost saving measures, Mayor Bogan proposed the elimination of DHHS to reduce expenses for fiscal year 1992. In total, 135 city positions would be unfunded or eliminated in the 1992 budget resulting in the actual termination of twenty-seven City employees. In addition, he froze all city employees salaries. While the Administrator of DHHS was the only administrator eliminated on the city employee roster, there were six to seven such positions proposed to be eliminated on the school employee roster.

Because the City of Fall River had created DHHS by ordinance, it could only be eliminated by ordinance. After Mayor Bogan presented his proposed budget cuts to the City Council, including an ordinance eliminating DHHS (hereinafter "the Ordinance"), the ordinance committee of the City Council, chaired by Ms. Roderick, reported out the Ordinance and recommended its passage. Shortly thereafter, a majority of the City Council approved the Ordinance in a six-to-two vote, with Ms. Roderick voting with the majority. Mayor Bogan signed the Ordinance into law eliminating DHHS and therefore eliminating Scott-Harris' position as Administrator of that department. The Ordinance became effective April 1, 1991.

Prior to the passage of the Ordinance, Mayor Bogan and Mr. Connors offered Scott-Harris another city position, Director of Public Health. Scott-Harris rejected that offer shortly before the Ordinance was passed.

## B. The Proceedings Below.

### 1. The District Court Decision.

Scott-Harris then filed suit in the United States District Court for the District of Massachusetts, against the City of Fall River, Mayor Bogan, Ms. Roderick, and other city councillors and officials, in their individual and official capacities, alleging that, by passage of the Ordinance, they had (1) discriminated against her in violation of 42 U.S.C. § 1983 based upon her race (Count I); and (2) discriminated against her in violation of 42 U.S.C. § 1983 based upon her speech protected by the First Amendment (Count II).<sup>1</sup> The district court asserted federal subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343(3). The district court denied Mayor Bogan and Ms. Roderick's motions to dismiss Counts I and II as to each of them on the grounds of absolute legislative immunity, reserving the issue until after trial.

The district court commenced a nine day jury trial on May 16, 1994. After the completion of the defendants' case, the district court and the parties conducted an

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<sup>1</sup> The other defendants included Mr. Connors, John Alberto, John Mitchell, Leo Pelletier, and Michael Plasski. By joint stipulation, the claims against Alberto, Mitchell, Pelletier, and Plasski were dismissed. Additionally, Scott-Harris voluntarily waived her claims pursuant to 42 U.S.C. § 1981, as well as her claims of sex discrimination and wrongful termination, and Count IV, alleging violations of Massachusetts General Laws c. 93, § 102, was dismissed. The district court asserted supplementary jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367. At trial, the district court granted Mr. Connors' motion for a directed verdict.

extensive jury charge conference. The result of that conference was a special verdict form which was explained to the jury in detail by the district court. The form, as explained by the court, required the jury to address the liability of the three defendants in a particular order: first the liability of the City (defined as the Mayor and the majority of the City Council), then the liability of Mayor Bogan and Ms. Roderick. The form required and the judge clearly instructed, that if the jury were to find that the City was not liable, then they were to proceed no further with their deliberations.<sup>2</sup> None of the parties objected to the instructions on the record prior to the jury charge.

After the charge was given, the case was submitted to the jury which, in response to the special questions, found that there was no racial discrimination but that Scott-Harris had proven that her protected speech was a substantial or motivating factor in the City's decision to enact the Ordinance. The jury, as required by the instructions and verdict form, then went on to find that both Mayor Bogan and Ms. Roderick proximately caused the

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<sup>2</sup> The special verdict form was effectively comprised of four sections: Question 1 through 4 dealt with the City's liability; Questions 5 through 7, and Questions 8 through 10 dealt with Mayor Bogan's and Ms. Roderick's individual liability, respectively; and Questions 11 through 15 then dealt with damages. The form advised jurors that, unless they found that the City had terminated Plaintiff because of her race (Question 2) or because she had engaged in constitutionally protected speech (Question 3), and found that the City had thereby proximately caused the Plaintiff injury (Question 4), they were not to address any question pertaining to either individual defendant.



elimination of Scott-Harris' position, and acted maliciously or with reckless indifference to Scott-Harris' rights.

Following the entry of the verdict, the City, Mayor Bogan and Ms. Roderick filed Motions for Judgment Notwithstanding the Verdict which the district court denied. Specifically, the district court rejected Mayor Bogan's and Ms. Roderick's (the "Individual Defendants"), argument that they were entitled to a verdict in their favor on the grounds of absolute legislative immunity. Noting that the First Circuit warranted submitting the question of whether the challenged actions were legislative or administrative to the jury, the court concluded that the Individual Defendants were not entitled to immunity because the jury had found that the proffered reason for the Ordinance was pretextual, and that a substantial or motivating factor in its enactment was Scott-Harris' protected speech. Further, the court noted that the "facially neutral" ordinance had a particularized impact on Scott-Harris as the only employee in the department eliminated by the Ordinance. The combination of these findings by the jury implied that "the ordinance amendment passed by the city council was an individually-targeted administrative act, rather than a neutral elimination of a position which incidentally resulted in the termination of the plaintiff."

## 2. The First Circuit Opinion.

On January 15, 1997, the First Circuit reversed the district court's denial of the City of Fall River's motion for judgment notwithstanding the verdict, holding that "no reasonable jury could find against the City on the

proof presented." With respect to the Individual Defendants, the Court of Appeals affirmed the denials of their motions notwithstanding the verdict on grounds of legislative immunity, causation and sufficiency of the evidence.

The Court of Appeals, after resolving issues related to the notice of appeal and the jury verdict form, addressed the liability of the municipality for passing a facially benign ordinance for allegedly unconstitutional reasons in violation of Scott-Harris' First Amendment rights. Noting the competing views on the quantum of proof necessary for a plaintiff to prevail under such circumstances, the court assumed that "in a sufficiently compelling case the requirement that the plaintiff prove bad motive on the part of a majority of the members of the legislative body might be relaxed . . . [but] any such relaxation would be contingent on the plaintiff mustering evidence of both (a) bad motive on the part of at least a significant bloc of legislators, and (b) circumstances suggesting the probable complicity of others." The court declined to explicate further on the level of proof necessary, holding that "Scott-Harris has not only failed to prove that a majority of the councilors possessed a bad motive, but she also has failed to furnish enough circumstantial evidence to ground a finding of that, more likely than not, a discriminatory animus propelled the City Council's action." Further, the court noted that Scott-Harris produced no evidence as to seven out of the eight councillors who cast votes on the Ordinance and there was nothing to suggest that the City had deviated from the normal protocol for receiving and enacting ordinances.

The First Circuit then turned to the individual liability of Mr. Bogan and Ms. Roderick. Although the unchallenged jury instructions indicated that if there were no liability against the City there could be no liability against either Mr. Bogan or Ms. Roderick, the court went on to address the individual municipal officials' liability and affirmed the district court's denial of their motions notwithstanding the verdict. Specifically, the court reasoned that the district court properly left the determination of absolute immunity to the jury and that based on the jury's findings regarding the motivating factors for the enactment of the Ordinance, the denial of absolute immunity was proper. Further, the court held that there was sufficient evidence, under traditional tort principles of proximate causation that the individuals were the proximate cause of the enactment of the lawful Ordinance which resulted in the elimination of DHHS. Finally, the court held that there was sufficient evidence to find that Scott-Harris' protected speech was a substantial or motivating factor behind the individuals' actions.

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## REASONS FOR GRANTING THE WRIT

### I.

#### THE DECISION OF THE FIRST CIRCUIT REGARDING THE APPLICABILITY OF ABSOLUTE LEGISLATIVE IMMUNITY TO THE ACTIONS OF MUNICIPAL OFFICIALS CONFLICTS WITH THE OPINIONS OF THIS COURT AND OTHER FEDERAL APPELLATE COURTS.

##### A. The First Circuit's Opinion Conflicts With Other Circuit Courts' Approaches to Absolute Legislative Immunity In the Context of Municipal Position-Elimination Ordinances.

In *Forrester v. White*, the Court articulated what it deemed a "functional approach" to the applicability of the absolute immunity doctrine. 484 U.S. 219, 224 (1988). Thus, whether a particular official is entitled to absolute immunity derives not from his or her title or position, but rather from the function with which the official has been lawfully entrusted, and the effect exposure to particular forms of liability would likely have on the appropriate exercise of those functions. *Id.* In the legislative context, this functional approach encompasses the determination of whether the challenged actions are legislative (for which there is absolute immunity), or administrative (for which there may only be qualified immunity). Although the circuit courts articulate slightly different standards, the majority rely on whether the action taken is traditionally legislative, involves the formulation of prospective, legislative-type policies rather than enforcement or application of existing policies, and whether the procedures followed in the action are those akin to proper legislative action. See, e.g., *Alexander v. Holden*, 66 F.3d 62,



66 (4th Cir. 1995) (discussing approaches adopted by First, Fifth and Eleventh circuits); *Hughes v. Tarrant County, Tex.*, 948 F.2d 918, 920 (5th Cir. 1991) (distinction to be made is that between establishing a policy or act, and enforcing or administering it); *Ryan v. Burlington County, NJ*, 889 F.2d 1286, 1290 (3d Cir. 1989) (actions must be both substantively and procedurally legislative); *Cutting v. Muzzey*, 724 F.2d 259 (1st Cir. 1984) (two part test focusing on nature of facts used to reach the decision and particularity of impact of the action). Despite these variations, most circuit courts have recognized the same needs at the local or municipal level as those at the state and federal level, and have expanded the doctrine of absolute immunity to include municipal or local officials acting in their legislative capacity. See, e.g., *Acevedo-Cordero v. Cordero-Santiago*, 958 F.2d 20, 22 (1st Cir. 1992); *Goldberg v. Rocky Hill*, 973 F.2d 70, 72 (2d Cir. 1992); *Haskell v. Washington Township*, 864 F.2d 1266, 1277 (6th Cir. 1988); *Aitchison v. Raffiani*, 708 F.2d 96, 98-99 (3d Cir. 1983); *Reed v. Shorewood*, 704 F.2d 943, 952-53 (7th Cir. 1983); *Espanola Way Corp. v. Meyerson*, 690 F.2d 827, 829 (11th Cir. 1982), cert. denied, 460 U.S. 1039 (1983); *Kuzinich v. County of Santa Clara*, 689 F.2d 1345, 1349-50 (9th Cir. 1982); *Hernandez v. Laffayette*, 643 F.2d 1188, 1193-94 (5th Cir. 1981), cert. denied, 455 U.S. 907 (1982); *Bruce v. Riddle*, 631 F.2d 272, 274-80 (4th Cir. 1980); *Gorman Towers v. Bogoslavsky*, 626 F.2d 607, 611-14 (8th Cir. 1980).

Although recognizing the difficulty in line-drawing at the local level, the Third, Fourth, Seventh, and District of Columbia circuits, as well as district courts from the Second, Ninth and Tenth circuits have directly addressed

the issue of the entitlement of municipal officials to absolute immunity in the context of position-elimination ordinances. See, e.g., *Carver v. Foerster*, 102 F.3d 96, 100 (3d Cir. 1996) (elimination of government position is legislative, but unilateral order to fire someone is not); *Alexander*, 66 F.3d at 65 (budgetary decisions which may necessarily impact on employment are generally legislative acts); *Roberson v. Mullins*, 29 F.3d 133, 135 (4th Cir. 1994) (termination of employee without eliminating position is unrelated to process of adopting prospective, legislative-type rules and therefore is not shielded by absolute immunity doctrine); *Gross v. Winter*, 876 F.2d 165, 172 n.10 (D.C. Cir. 1989) (personnel actions flowing from traditional legislative functions like budget decisions are the type of actions for which legislators enjoy absolute immunity); *Rateree v. Rockett*, 852 F.2d 946, 950 (7th Cir. 1988) (budget making is quintessentially legislative function and job loss as a result of budget process does not make act administrative); *Aitchison*, 708 F.2d at 98 (mayor entitled to legislative immunity for act of voting to pass ordinance eliminating plaintiff's position, regardless of claim of any unworthy purpose); *Rabkin v. Dean*, 856 F. Supp. 543, 547 (N.D. Cal. 1994) (legislative votes affecting positions and salaries of city employees are consistently interpreted as legislative acts); *Racine v. Cecil County*, 843 F. Supp. 53, 54-55 (D. Md. 1994) (position elimination and therefore entitled to absolute immunity); *Drayton v. Mayor & Council of Rockville*, 699 F. Supp. 1155, 1156 (D. Md. 1988) (job elimination through budgetary process is a legislative act entitled to absolute immunity regardless of alleged discriminatory motives), *aff'd*, 885 F.2d 864 (4th Cir. 1989); *Herbst v. Daukas*, 701 F. Supp. 964, 968 (D. Conn. 1988)

(decision to hire or fire generally considered administrative, the abolition of municipal positions constitutes a legislative act); *Ditch v. Bd. of County Comm'rs*, 650 F. Supp. 1245, 1248-49 (D. Kan. 1986) (elimination of a program or job title is a formulation of policy and therefore entitled to absolute immunity), *amended on other grounds*, 669 F. Supp. 1553 (D. Kan. 1987); *Dusanenko v. Maloney*, 560 F. Supp. 822, 827 (S.D.N.Y. 1983) (absolute immunity applied to decision by town officials to reduce salaries), *aff'd*, 726 F.2d 82 (2d Cir. 1984); *Goldberg v. Spring Valley*, 538 F. Supp. 646, 650 (S.D.N.Y. 1982) (individual trustees who approved mayor's action which resulted in elimination of plaintiff's position were entitled to absolute immunity); *see also Berkley v. Common Council of City of Charleston*, 63 F.3d 295, 302 (4th Cir. 1995) (council decision to deny salary increases as part of enacting annual budget was a core legislative function), *cert. denied*, 116 S. Ct. 775 (1996).

According to these cases, individual local government officials involved in the enactment of resolutions or ordinances which are budgetary, eliminate local government positions, and/or restructure local government departments, are entitled to absolute immunity, regardless of their motive, because these actions are legitimate legislative activities as a matter of law. As stated in *Rateree*,

[B]udget making is a quintessential legislative function, reflecting the legislator's ordering of policy priorities in the face of limited financial resources. When budgets are cut materially in an industry as labor-intensive as that of local government, some people will almost surely

lose their jobs. But that does not convert a budget cut into an administrative employment decision. . . . Almost all budget decisions have an effect on employment by either creating or eliminating positions or by raising or lowering salaries. This reality, however, does not transform a uniquely legislative function into an administrative one.

852 F.2d at 950 (internal quotations and citations omitted).

In stark contrast, the First Circuit stands alone from these circuits in its application of absolute legislative immunity in the context of municipal officials enacting budgetary legislation and, in particular, position-eliminating legislation. Compare *Scott-Harris v. City of Fall River, et al.*, slip op. at 30-31 (1st Cir. January 15, 1997) (affirming district court's decision that defendants were not entitled to absolute legislative immunity for enactment of ordinance as part of budgetary process because their alleged reason and motives for enactment were improper) with *Rateree*, 852 F.2d at 950 (applying doctrine of absolute immunity to legislators who passed ordinance eliminating municipal positions even though there was evidence the action was targeted at specific individuals for political reasons) and *Gross*, 876 F.2d at 172 n.10 (council member that fired assistant was not entitled to legislative immunity and noting that case was not like *Rateree* where personnel action flowed from budgetary decisions for which legislators enjoyed absolute legislative immunity) and *Aitchison*, 708 F.2d at 98 (mayor entitled to legislative immunity for act of voting to pass ordinance eliminating plaintiff's position, regardless of claim of any



unworthy purpose) and *Rabkin*, 856 F. Supp. at 547 (legislative votes affecting positions and salaries of city employees are consistently interpreted as legislative acts).

The First Circuit's opinion, concluded that the position-elimination ordinance, enacted as part of the City's budgetary process, was not legislative. Rather, the court, in contravention of this Court's opinions and the approaches of other courts, looked behind a facially neutral, position-elimination ordinance to conclude that the Individual Defendants' actions were administrative, not legislative actions.<sup>3</sup> In light of this apparent conflict in the circuits regarding the availability of absolute immunity to local or municipal officials for their actions regarding budgetary and/or position-elimination enactments, substantial questions are presented which warrant resolution by this Court. *See Sup. Ct. R. 10*.

**B. The First Circuit's Reliance on Individual Municipal Officials' Motives for Their Legislative Actions Conflicts With This Court's Opinions Regarding Absolute Legislative Immunity.**

"The immunity of legislators from civil suit for what they do or say as legislators has its roots in the parliamentary struggles of 16th- and 17th-century England;

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<sup>3</sup> The enactment of the Ordinance was the only allegedly wrongful act at issue in the district court trial and on appeal. Therefore, this is not a case where the plaintiff has alleged conduct preceding or outside the traditional legislative process. *Compare Carver*, 102 F.3d at 99 (issue was whether defendant was entitled to absolute immunity for his pre-vote activity).

such immunity was consistently recognized in the common law and was taken as a matter of course by our Nation's founders." *Lake County Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391, 403 (1979) (extending absolute legislative immunity to members of regional planning board for their legislative acts). In *Tenney v. Brandhove*, this Court clearly articulated both the boundaries and purposes of the doctrine of absolute immunity in the legislative context, 341 U.S. 367, 376-79 (1951) (concluding that individual California legislators acting on investigatory committee were entitled to absolute legislative immunity because they "were acting in a field where legislators traditionally have power to act"); *see also Lake County Estates*, 440 U.S. at 404-06. Discussing the precursor to Section 1983, the Court concluded that Congress did not intend to overturn the common law immunities and constitutional immunities granted to legislators. 341 U.S. at 376-79. Absolute immunity, therefore, protected state legislators from liability under the civil rights statute for alleged injuries resulting from actions taken in the course of "legitimate legislative activity." *Id.* at 376. While the immunity available to legislators was not limitless, the Court stated that "[t]he claim of an unworthy purpose does not destroy the privilege. . . . The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives." *Id.* at 377.

Further, the Court made clear that the courts were not the proper forum to consider the motives of policy

makers engaged in legitimate legislative activity. *Id.* Specifically, Justice Frankfurter, writing for the majority, stated:

*In times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed. Courts are not the place for such controversies. Self-discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses. The courts should not go beyond the narrow confines of determining that a committee's inquiry may fairly be deemed within its province.*

*Id.* at 378 (emphasis added). Thus, by affording legislators the protection of absolute immunity, they would be free to do what they were elected by their constituency to do, unfettered by fear of constituent lawsuits. *Id.* at 376; see also *Supreme Court of Va. v. Consumers Union*, 446 U.S. 719, 731 (1980) (concluding that federal and state legislative immunity were coterminous and stating that, in either context, "[t]he purpose of [legislative] immunity is to insure that the legislative function may be performed independently without fear of outside interference"). Therefore, the interests in having legislators perform their duties based on objective criteria rather than fear of retribution from those constituents who may be adversely affected, outweighs the interests of the potentially wronged party in seeking redress from particular individuals.<sup>4</sup>

<sup>4</sup> This is buttressed by the fact that municipal entities may not avail themselves of any immunity defense. See *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 106 (1993). Thus, the injured party is not left without

The First Circuit's opinion conflicts with these pronouncements. Relying on its earlier decisions in *Cutting v. Muzzey* and *Acevedo-Cordero v. Cordero-Santiago*,<sup>5</sup> the First Circuit stated that the determination of whether an act is legislative is a question of fact and that the district court properly reserved the issue of the applicability of legislative immunity until trial because there was "conflicted evidence as to the defendants' true motives" for enacting the legislation. Characterizing the Individual Defendants' prior motions to dismiss the action on absolute legislative immunity grounds as "premature",<sup>6</sup> the First Circuit

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all recourse, because they may resort to suit against the municipality (or other legislative body); or to the ballot box. See *Lake County Estates*, 440 U.S. at 405 n.29 ("If the respondents have enacted unconstitutional legislation, there is no reason why relief against TRPA itself should not adequately vindicate petitioners' interests.") (citing *Monell v. New York City Dep't of Social Services*, 436 U.S. 658 (1978)); *Rateree*, 852 F.2d at 951 ("One recourse in dealing with legislators who hide behind their shield of immunity and vote 'improperly' is, of course, a resort to the ballot box."); *Aitchison*, 708 F.2d at 953 (liability against municipal'ity is not precluded simply because legislators may be absolutely immune).

<sup>5</sup> In *Acevedo-Cordero*, the First Circuit affirmed the district court's denial of the municipal officials' motion for summary judgment on legislative immunity grounds. See 958 F.2d at 23-24. The court reasoned that the motion was properly denied because there were genuine issues of material fact as to the motivation for the enactment of the position eliminating ordinance. *Id.* at 23.

<sup>6</sup> In fact, absolute immunity is *intended* to be raised at the early stages of the litigation because its very purpose is to protect legislators "not only from the consequences of litigation's results, but also from the burden of defending



rested its affirmance of the district court's decision regarding the motions notwithstanding the verdict on grounds that the trial court properly relied on two findings by the jury: (1) the defendants' [all three defendants] stated reason for enacting the ordinance was not their real reason<sup>7</sup>; and (2) Scott-Harris' protected speech was a substantial or motivating factor in the actions by the Individual Defendants relating to the Ordinance. In essence, therefore, the First Circuit held that the motives underlying the action, rather than the function of the action, *i.e.*, legislative or administrative, was determinative of whether an individual legislator is entitled to the protection of absolute immunity.

Not only is this approach contrary to this Court's pronouncements regarding absolute legislative immunity in *Tenney* and its progeny,<sup>8</sup> but defeats the very purpose

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*themselves.*" *Supreme Ct. of Va.*, 446 U.S. at 731-32 (emphasis added).

<sup>7</sup> Not only is this basis for the denial flawed because it relied on motive, which is clearly an impermissible factor in the absolute immunity analysis, but it clearly contradicts the First Circuit's holding in the beginning of its opinion: that there was insufficient evidence to show that the City (defined as the Mayor and the majority of the City Council) enacted the ordinance for impermissible reasons.

<sup>8</sup> The consideration of motive in the determination of whether an act is legislative or administrative for purposes of absolute immunity has also been disavowed by several circuit courts. *See, e.g., Rateree*, 852 F.2d at 951 (absolute immunity shields conduct that is legislative even though legislator may have acted for seemingly improper motives); *Aitchison*, 708 F.2d at 98 (immunity not lost even if allege bad motive); *Bruce*, 631 F.2d at 280 (quoting relevant language from *Tenney*); *Drayton*, 699 F. Supp. at 1156 (allegations concerning alleged

of the doctrine of absolute immunity, *i.e.*, that when performing certain functions, individual legislators are entitled to be free from the distraction of defending litigation based on actions taken performing those functions. The First Circuit's approach would result in the usurpation of the legal determination regarding immunity by virtue of the fact that a plaintiff ordinarily pleads improper motive when alleging a civil rights action against individuals pursuant to section 1983, and it is generally considered inappropriate to resolve issues of motive at the summary judgment stage. In effect, therefore, every individual defendant would be forced to await the resolution of factual issues regarding their motivation prior to being entitled to absolute immunity. Clearly, this is not what this Court intended absolute immunity to involve and eviscerates the very protections absolute immunity was intended to provide.

Thus, the Petitioners pray that this Court issue a Writ of Certiorari to review the judgment and opinion of the First Circuit because that opinion alters the doctrine of absolute legislative immunity as articulated by relevant decisions of this Court. *See Sup. Ct. R. 10.*

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discriminatory motives not relevant where immunity at issue was absolute).

## II.

**THE DECISION OF THE FIRST CIRCUIT RAISES AN ISSUE OF SUBSTANTIAL IMPORTANCE REGARDING INDIVIDUAL LIABILITY OF LEGISLATORS PURSUANT TO 42 U.S.C. § 1983.**

This case squarely raises an issue of substantial importance regarding the liability of legislators in their individual capacities – whether legislators, at any level of government, may be liable in their individual capacities for the enactment of facially benign and lawful legislation purely on the basis that they harbored an improper animus towards those adversely affected by the lawful legislation. In a departure from established principles of traditional tort law, the First Circuit held that while the official decision making body lawfully enacted facially benign legislation, individual legislators could be found to be the proximate cause of the plaintiff's injury pursuant to § 1983, based *only* on their improper motivation. As such, the opinion opens the door for courts to impose liability on individual legislators despite the existence of a superseding cause, *i.e.*, the enactment of facially neutral legislation by the official decision maker absent evidence of any impermissible purpose or infusion of the individual's improper motivations into the deliberative process. To sanction such an approach, would impermissibly permit courts to hinder the enactment of proper, necessary, and fiscally sound legislation.

As demonstrated by cases from the First Circuit and other circuits, this result cannot stand. Specifically, case law involving somewhat analogous § 1983 claims reflects a recognition, either explicit or implicit, that individual defendants may be liable under § 1983 *only if*: (a) the

action challenged by the plaintiff was improper and (b) the individual defendants played a significant role in shaping or orchestrating the improper action. *See, e.g., Wagenmann v. Adams*, 829 F.2d 196 (1st Cir. 1987) (bail decision was improper because, absent the defendant police officer's misrepresentations, there was no basis for the bail; the defendant police officer "was in all probability the cause of the ruling" made by the clerk who set bail); *Springer v. Seamen*, 821 F.2d 871 (1st Cir. 1987) (summary judgment for individual defendants was deemed improper because, absent misconduct of the individual defendants, there was no basis for the termination decision and plaintiff's entire claim was that his termination was caused by the investigation); *Arnold v. Int'l Business Machines, Corp.*, 637 F.2d 1350, 1355 (9th Cir. 1981) (if plaintiff could have pointed to evidence showing that individual defendants had some control or power over state actor, and had directed it to take certain action, there would have been a dispute of material fact on issue of proximate causation under § 1983); *Furtado v. Bishop*, 604 F.2d 80 (1st Cir. 1979) (two inmates were improperly transferred to segregated confinement because the defendant correctional officers submitted false reports and recommendations concerning them and confinement orders were specifically based upon the false reports), *cert. denied*, 444 U.S. 1035 (1980). In all of these cases, the evidence demonstrated that the ultimate decision makers were mere conduits of the defendants' unlawful motivations because they directly relied upon the individual defendants' improper information. Under these circumstances, a finding that the individual defendants' actions



were the proximate cause of the plaintiffs' injuries was found proper.

In the present case, even assuming improper animus on the part of the Individual Defendants, they could have been found to be the proximate cause of the position elimination only if: (a) the decision itself was unlawful, in that a majority of the City Councillors shared their improper animus; or (b) they "hoodwinked" a majority of the City Councillors into believing that the position should be eliminated for budgetary reasons which, unbeknownst to the Councillors, were pretextual. With respect to the first scenario, the First Circuit found that the enactment of the Ordinance itself was not unlawful in that a majority of the City Councillors did not share the Individual Defendants' improper animus. With respect to the second scenario, Scott-Harris chose not to present *any evidence* that the Individual Defendants *had* attempted to "hoodwink" or "fool" a majority of the City Councillors in this fashion. There was *no* evidence introduced that the Individual Defendants made any ongoing or improper efforts to induce other Councillors to act for illicit or impermissible reasons. Under such circumstances, where the causal connection between the Individual Defendants' actions and the alleged constitutional deprivation is too tenuous, there is no basis for imposing liability on individual legislators.

Further, absent evidence that the City Councillors voted to terminate Scott-Harris either for constitutionally impermissible reasons or because they were "hoodwinked" by the Individual Defendants into doing so, there is *no* record evidence that the position elimination decision itself was improper. More specifically, there is no

evidence to support a finding that a majority of the City Councillors took action based upon any factors other than legitimate economic ones. As a matter of law, therefore, the Individual Defendants could not have been the *proximate* cause of any *actionable* injury to Scott-Harris under these circumstances. In other words, the independent action of the official decision maker to enact a facially benign ordinance for proper reasons, must be a superseding cause severing the causal connection between the Individual Defendants' actions and the Scott-Harris' alleged injury.

Finally, the First Circuit's approach raises issues of critical importance from a public policy perspective. Absent a finding that a challenged municipal action is in fact improper, individual legislators and officials involved in the legislation could be held liable for their role in the enactment of perfectly legal and proper legislation. This would be particularly troubling in the context of the instant case, where the challenged legislation has been found to be not only *facially* benign, but was enacted for a benign *reason* as well. The result of a contrary rule would be to invite litigation, regardless of whether the challenged legislation was lawful, and regardless of whether it was enacted for lawful reasons. In such cases, one would pursue an action against as many individual legislators as one could, arguing that if any of them had a "bad" motive and participated *in any way* in the legislative process (regardless of whether they attempted to persuade others of their views), their participation could be a "proximate" cause of the challenged legislation – again, without regard to how lawful the legislation itself

might be. Not only is this approach contrary to traditional principles of tort law, but such an approach would abruptly and forcefully open the door to individual liability, which should be opened only narrowly and with caution.

Because the First Circuit opinion raises an issue of substantial importance regarding the application of traditional tort principles to impose liability on individual legislators, the Petitioners respectfully pray that this Court issue a Writ of Certiorari to review the First Circuit's judgment and opinion. *See Sup. Ct. R. 10.*

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## CONCLUSION

For the foregoing reasons, Petitioners, Daniel Bogan and Marilyn Roderick, respectfully pray that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the First Circuit.

Dated: April 4, 1997

Respectfully submitted,

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**APPENDIX A**

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

JANET SCOTT-HARRIS,

Plaintiff,

v.

CITY OF FALL RIVER,  
MASSACHUSETTS; DANIEL E.  
BOGAN, individually; ROBERT  
L. CONNORS, individually;  
MARILYN RODERICK,  
individually,

Defendants.

CIVIL ACTION NO.  
91-12057-PBS

MEMORANDUM OF DECISION AND ORDER ON  
DEFENDANTS' MOTIONS FOR JUDGMENT  
NOTWITHSTANDING THE VERDICT

January 27, 1995

SARIS, U.S.D.J.

INTRODUCTION

A federal jury found that plaintiff Janet Scott-Harris had proven that punishment for her protected speech was a substantial or motivating factor in the decision of the defendant City of Fall River to eliminate, by ordinance, her position of Administrator of the Department of Health and Human Services. Accordingly, it found the defendant Fall River liable under 42 U.S.C. § 1983 for compensatory damages, and defendant Daniel E. Bogan, then mayor, and Marilyn Roderick, then vice president of



the city council, liable for punitive damages. All defendants have moved for judgment notwithstanding the verdict pursuant to Fed. R. Civ. P. 50(b). After hearing, the motions are *DENIED*.

### BACKGROUND

#### A. Facts

Based on the evidence, the jury could have found the following facts:

##### 1. The Appointment

Plaintiff Janet Scott-Harris, an African-American, was appointed the administrator of the Department of Health and Human Services in Fall River in September, 1987. A resident of Ohio, she had never been to Fall River before. When she was initially interviewed, Robert Connors, the city administrator, offered her a choice of being the Administrator of the Department of Health and Human Services or Director of Personnel. She chose the former position with a salary of \$48,600, although it paid less money and did not have civil service or contract protection. Her position was terminated in March, 1991. At the time she was terminated, she was the first and only African-American person ever to have served in a management, supervisory position in the City of Fall River. All agree she did a great job.

Scott was the first person to fill the position of Administrator of the Department of Health and Human Services, as this was a newly created Department. She

managed four divisions: the Public Health Department; the Council on Aging; Code Enforcement; and Veterans Affairs. She was the only person to work for the department, ~~as~~ opposed to the divisions. As three of the division heads were sick or disabled, she effectively ran these divisions. She reported to Robert Connors about two times a week.

##### 2. Run-ins with Roderick

In 1988, defendant Marilyn Roderick was the Vice President of the City Council and Chair of the Ordinance Committee of the City Council. Scott-Harris had several run-ins with Roderick. First, Roderick asked her to hold up building permits for reasons which Scott-Harris disagreed with. Second, they had a confrontation over hiring the youth coordinator position. During an interview with an African-American candidate for the job, Roderick made a reference to one of the candidates as helping "his people" by providing good direction to young people. Scott-Harris abruptly left the interview. Roderick followed and they had a screaming match in Scott-Harris' office about the propriety of referring to the candidate's ethnicity. Knowing that she had offended a key municipal official, Scott-Harris offered her resignation to Connors, who declined it and urged her to stay on. Roderick went to then Mayor Carleton Viveiros to complain. Scott-Harris called to apologize, but Roderick hung up on her. A bitter relationship between the two persisted.

On January 24, 1989, Roderick called her on the carpet at a public committee hearing for failing to recommend a raise for "Dotty" Biltcliffe, who was a nutrition

program assistant on the staff of the Council On Aging, under Scott-Harris' supervision. Biltcliffe, who had known Roderick for over ten years, had called Roderick about the raise.

### 3. Biltcliffe

Because the head of the Council on Aging was terminally ill, Scott-Harris served as Biltcliffe's immediate supervisor until Paula Gousie, the assistant director, was named acting head. In October, 1990, Biltcliffe was involved in negotiations with a food service provider, and had a disagreement with Gousie. She told Gerard LeTourneau, an assistant manager of the nutrition program, that a secretary was a "little black bitch". Commenting to LeTourneau about Gousie, Biltcliffe didn't mince words, "That little French bitch has her head up that nigger's ass," referring to Scott-Harris. LeTourneau complained to Scott-Harris about the every-day racial slurs and harassment by Biltcliffe of drivers and co-employees and submitted a written statement on October 16, 1990. Scott-Harris consulted with Connors about the appropriate personnel action. In 1988, Connors had ordered Biltcliffe suspended for five days for unauthorized use of a city vehicle. Because Biltcliffe had civil service status, Scott-Harris contacted Sharon Skeels, the head of the personnel department. On October 25, 1990, Scott-Harris prepared the charges for terminating Biltcliffe. When she saw the charges, Biltcliffe told Scott-Harris that she was "nothing but a black nigger bitch", that she "knew people" and Scott-Harris would be "sorry". Biltcliffe went on leave when Scott-Harris told

her the charges, claiming that she had hypertension and could not work.

Originally the hearing on the termination charges was to be held in November, 1990, but there were many delays. The city hired a legally blind attorney in his 80's with hearing problems to represent the city at the hearing. Biltcliffe called Roderick concerning the proceedings, and Roderick discussed the call with Connors who said that the investigation would be handled properly. Biltcliffe had also called another city councillor, who is a close friend of Roderick, to complain about the investigation and the charges.

While the charges were pending, the pressure on Scott-Harris increased. On November 14 or 15, 1990, Roderick sent a memo to Connors complaining about Scott-Harris' use of a city vehicle. Scott-Harris received a phone call from State Senator Tom Norton, who said that Dorothy Biltcliffe called him five or six times a day demanding that he intervene.

Because of federal funding cuts, in November, 1990, Scott-Harris in her budget submission proposed to eliminate four positions from the nutrition program, including Biltcliffe's. However, because of Biltcliffe's civil service status, the elimination of her position simply meant that she was supposed to be reinstated to her former position as an administrative assistant at the Council on Aging. She had been placed on a leave of absence from her permanent civil service job in the Council on Aging to serve in the nutrition position, which was federally funded, but under applicable regulations she had not lost her property rights to her civil service position. However,



because of a bureaucratic snafu, another employee had been permanently appointed to Biltcliffe's old civil service position. Therefore, an unneeded second position was created just for Biltcliffe.

Afraid for her own position because of all the pressure she was feeling regarding Biltcliffe, Scott-Harris wanted to drop the charges against her, as long as Biltcliffe was transferred out of the Department of Health and Human Services. Connors insisted on pressing charges against Biltcliffe because he had "zero tolerance" for racial slurs.

#### 4. The Budget

Meanwhile, the city of Fall River was anticipating local aid cuts for Fiscal Year 1992, which was the year running from July 1, 1991 to June 30, 1992. Generally, the city administrator must put together a budget together with the treasurer and comptroller, and then the mayor submits the budget to the city council for approval by April 30, 1991. By October 1990, the city had to begin making its budget estimation for Fiscal Year 1992.

Defendant Bogan, himself a former city councillor and chairman of the city council, had assumed the position of interim mayor in December, 1990, after former Mayor Viveiros had resigned to become a clerk-magistrate. He stayed in that job until June, 1991. Bogan had been on the screening committee that initially hired Scott-Harris. He also knew Biltcliffe, and had served on a committee with her several years before.

Bogan and Connors expected a cut of local aid between five and ten percent. Connors, as administrator, was instructed to propose a list of lay-offs and proposals to cut costs. Scott-Harris, as Department head, submitted a proposed set of budget cuts which included reducing the hours of school nurses when the children were not in school and of nurses at senior homes on weekends. Bogan rejected this proposal, and decided to cut her position instead. Connors opposed eliminating Scott-Harris' position because he thought she was doing a good job, because the reorganization of the four divisions into a department made sense from a management perspective, and because budget cuts could be accomplished in other ways. Although Connors did not propose cutting Scott-Harris' position, Mayor Bogan made the decision to terminate the position anyway. He testified that he opposed making cuts in front line positions, and that the only reason Scott-Harris was the sole manager cut was because she had no civil service or contract protection. Connors suggested to the Mayor that if the position were cut, Scott-Harris should be offered the position of Director of Public Health.

As mayor, Bogan submitted the proposed ordinance eliminating the Department of Health and Human Services to the full City Council, which then referred it to the Ordinance Committee, consisting of five members. Roderick set the agenda for the Ordinance Committee. Because the Department of Health and Human Services was established by ordinance, it had to be eliminated by ordinance. It held only one position apart from the divisions within it: the administrator. While the ordinance was under consideration, one city councillor called Scott-

Harris to ask "why they were trying to get rid" of her. As noted earlier, the proposed ordinance eliminating Scott-Harris' position had to be passed first by the Ordinance Committee, which Roderick had chaired for nine years. On March 5, 1991, after hearing, the Ordinance Committee reported out the proposed ordinance favorably. The ordinance eliminating the Department of Health and Human Services was passed six to two.

All the councilors knew that eliminating the Department of Health and Human Services was tantamount to terminating Scott-Harris' job because she was the only one independently employed by the "department." The only reason stated during the City Council discussion of the ordinance was the projected shortage of money; no one discussed the Biltcliffe affair, or any dissatisfaction with Scott-Harris' performance.

Altogether, 134 positions were eliminated in addition to Scott-Harris' for fiscal year 1992, of which 40 had already been vacant. But Scott-Harris' position was the first to be terminated, and she was the only management employee laid off, outside of certain administrators within the school department. The other employees did not get notice until three months later in May 15, 1991. Roderick became president of the city council at the end of 1991, and was a mayoral candidate in that year.

The evidence concerning Fall River's actual financial status in 1992 was conflicting and confusing. Fall River did experience an 8 to 10 percent reduction in local aid, depending on how it is calculated. However, the budget for Fiscal Year 1992, submitted on April 30, 1991, appeared to increase by \$1 million over the budget for

Fiscal Year 1991. There was evidence that the elimination of Scott-Harris' position actually cost the city more money, because the city ended up hiring administrators for the three agencies – Department of Public Health, Council on Aging, and Veterans Affairs – which she had been running on the side.

Fall River is a plan A city, which means it has a strong mayor. See Mass. Gen. Laws ch. 43, § 46 *et seq.*

### 5. The Termination

On February 12, 1991, Connors told Scott-Harris of the decision to eliminate the position of Director of Health and Human Services, and informed her that she had the option either of taking the position of Public Health Director, which entailed a \$12,000 reduction in salary, or leaving. Scott-Harris proposed merging the positions of Council on Aging and Director of Public Health, but this proposal was rejected by then Mayor Bogan, as well as by Connors. Plaintiff's former position was eliminated, effective April 1, 1991.

On February 28, 1991, Scott-Harris accepted the position as Director of Public Health. In a letter dated March 1, 1991, Bogan informed Scott-Harris that as Director, she had two additional responsibilities not previously assigned to Public Health – Food and Milk, and Weights and Measurements – and that he was moving her office. According to Scott-Harris, these two new areas of responsibility involved many problems, and the office was a "dungeon" on the opposite side of the building, without any carpets.



Insulted and outraged by Bogan's redefinition of the job and the perceived exile to the rear of city hall, Scott-Harris fully intended to the [sic] reject the job and drafted a letter on March 4, 1991 to that effect, which she left on her desk. After talking to her attorney, she calmed down and decided to accept the position. However, the original letter had been purloined and had mysteriously been sent to the mayor's office. That same day, Scott-Harris told the mayor's secretary to rip up the letter, but it was too late. Copies had been circulated to Connors and elsewhere in town hall. On March 6, 1990, although Bogan was aware that Scott-Harris had attempted to retract the original letter, he sent Scott-Harris a letter stating that her last day was to be March 29, 1991. All efforts to contact the mayor failed. Scott-Harris' attorney wrote to Bogan on March 15, but got no response.

#### 6. Post-script

Two days before Scott-Harris' last day on the job, March 27, 1991, the hearing against Dorothy Biltcliffe took place. Skeels was the hearing officer. The action was settled. Dorothy Biltcliffe agreed to a sixty working day suspension without pay. After Bogan received correspondence from Senator Norton, Biltcliffe was reinstated on June 3 rather than on June 21, 1991, over the objection of Connors. Bogan testified that he did not even learn about the Biltcliffe situation until May, 1991, when he received the letter from Senator Norton. Biltcliffe was still working for the city as of the time of trial.

#### B. Procedure

Just prior to trial, defense counsel moved to dismiss on the grounds that the defendants were entitled to absolute legislative immunity. Relying on *Acevedo-Cordero v. Cordero-Santiago*, 958 F.2d 20, 23 (1st Cir. 1992), the Court denied the motions. Plaintiff sought to prove at trial that two illicit motives underlay her termination in violation of 42 U.S.C. § 1983. The first was racial discrimination (Count I). The second was retaliation for the exercise of her right, under the First Amendment, to engage in political speech by criticizing the racial attitudes of Biltcliffe and other public servants (Count II). Defendants presented evidence that the only motive for the actions resulting in the elimination of plaintiff's position was budgetary, and plaintiff argued that was a pretext. Neither party presented evidence of "mixed motives," or pressed for jury instructions or a special verdict form on a theory that the city had mixed motives.

After the close of opening statements, all defendants moved for a directed verdict pursuant to Fed.R.Civ.P. 50(a). This was denied. Defendants renewed the motion at the close of plaintiff's evidence. The Court directed a verdict in favor of defendant Connors on the ground there was insufficient evidence from which a jury could find impermissible motivation on his part. The only evidence presented by plaintiff against Connors was that he failed to return her calls after February 12, 1991. This is inadequate in light of the undisputed evidence that Connors was the one who hired Scott-Harris, encouraged her to stay on the job after the first altercation with Roderick, insisted that the charges against Biltcliffe be pressed

when Scott-Harris was willing to drop them, assisted Scott-Harris in presenting charges against Biltcliffe, opposed the termination of Scott-Harris, proposed giving her the job as director of public health, and opposed the early return on Biltcliffe. If anything, he was a stronger advocate than plaintiff in attempting to discipline Biltcliffe. As to the remaining 3 defendants, the motion was denied.

The jury was given a special verdict form, pursuant to Fed.R.Civ.P. 49, which segmented the inquiry into fifteen sequential questions. In the first question, the jury was asked whether plaintiff had proven that the neutral reason proffered by the City was "not the true reason." The following nine questions dealt, as to each defendant in turn, with the requisite state of mind for racial discrimination, the requisite state of mind for punishing free speech, and the causal nexus between defendants' acts and plaintiff's injury. The last five questions dealt with damages. There were no objections to either the verdict form or the instructions.

Although Count I stated a claim under 42 U.S.C. § 1983, the Court, without objection, crafted the first two jury interrogatories in light of *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742, 2746-2747 n.1 (1993) (assuming that the *McDonnell Douglas* framework for claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), was fully applicable to racial-discrimination-in-employment claims under 42 U.S.C. § 1983). In *St. Mary's*, the Supreme Court held that for a plaintiff to prevail, she must show "both that the reason [given by defendant employer] was false and that discrimination was the real reason." *Id.* at 2749 n.4, 2752. Plaintiff requested that the

two portions of her burden be divided into two questions. *See id.* n.4 ("Even though (as we say here) rejection of the defendant's proffered reasons is enough at law to sustain a finding of discrimination, there must be a finding of discrimination.") (emphasis in original).

The third question was premised on *Mt. Healthy City School Dist. Bd. of Ed. v. Doyle*, 429 U.S. 274, 286, 97 S. Ct. 568, 575 (1977), which required plaintiff to prove that her protected speech was a substantial or motivating factor in the decision to eliminate her position. However, presumably because they were not arguing mixed motives, the defendants did not ask for either jury instructions or a special verdict form under the second part of the *Mt. Healthy* analysis. *See Mt. Healthy*, 429 U.S. at 286, 97 S. Ct. at 575 (where there is evidence that an employee would not have been reemployed because of poor performance after plaintiff proved that speech was a substantial factor in the decision not to rehire, the burden shifted to defendant to prove that it would have reached the same decision even in the absence of the protected conduct).

No one anticipated the possible inconsistency created if the jury answered question 1 "no" under the first part of the *St. Mary's* analysis and question 3 "yes" under the *Mt. Healthy* analysis.<sup>1</sup>

In response to Question 3, the jury answered that plaintiff's protected speech was a substantial or motivating factor in the termination of her employment, and

<sup>1</sup> Indeed, if the case had been argued on a mixed motive theory, the answers would not necessarily have been inconsistent.



awarded damages to plaintiff. But it also found, in it [sic] initial response to the first question, that plaintiff had failed to prove that the reason proffered by the City for her termination was pretextual. The Court voiced concern that these answers could be perceived as inconsistent, and all counsel agreed. However, the solution was not agreed upon. Defendants moved for mistrial. Over the objection of the defendants, this court gave a supplemental instruction, modifying and clarifying the instructions and the jury questionnaire by stating that a "no" answer to Question 1 precluded a "yes" answer to Question 3. Defendants did not object to the substance of the instruction but urged the Court to direct a verdict or grant a new trial based on the inconsistency. The second returned verdict form, which was accepted by the court, responded affirmatively to the first question - finding that the reason for plaintiff's termination proffered by the City was pretextual. The jury further found that, while plaintiff had failed to prove racial animus as to any of the defendants, she had succeeded in proving that her constitutionally protected speech in pressing for Biltcliffe's termination was a substantial or motivating factor in the actions resulting in the elimination of her position. On this reasoning, the City was found liable for \$156,000 in compensatory damages; Bogan for \$60,000 in punitive damages; and Roderick for \$15,000 in punitive damages. All three now move for judgment notwithstanding the verdict (JNOV), pursuant to Fed.R.Civ.P. 50(b).

### C. Standard of Review

A motion for directed verdict under Rule 50(a) and a motion for JNOV under Rule 50(b) are subject to the same stringent standard. *Censullo v. Brenka Video, Inc.*, 989 F.2d 40, 42 (1st Cir. 1993). A district court may grant a Rule 50 motion

"only after a determination that the evidence could lead a reasonable person to only one conclusion," . . . namely, that the moving party was entitled to judgment[.] . . . The district court "may not consider the credibility of witnesses, resolve conflicts in testimony, or evaluate the weight of the evidence." The trial court is "compelled, therefore, even in a close case, to uphold the verdict unless the facts and inferences, when viewed in the light most favorable to the party for whom the jury held, point so strongly and overwhelmingly in favor of the movant that a reasonable jury could not have arrived at this conclusion."

*Biggins v. Hazen Paper Co., Inc.*, 953 F.2d 1405, 1409 (1st Cir. 1992) (citations omitted). In short, a directed verdict or a JNOV is appropriate only where "there is a total lack of evidence in support of plaintiff's case." *Censullo, supra*.

### DISCUSSION

There are four legal objections that would nullify the verdict as to the defendants: (a) that the court was obliged to accept the first verdict form as final; (b) that defendants are entitled to absolute legislative immunity; (c) that there was insufficient evidence against Bogan and Connors to support the award of damages; (d) that there

was insufficient evidence of the intent of the individual legislators from which the jury could find by a preponderance of the evidence that the City possessed the requisite state of mind. Each objection is discussed in turn.

#### A. The Contradictory Verdict

At the outset, it should be noted that defendants did not challenge the first verdict form itself. Any objection based on the potentially confusing structure of the first form was waived when defendants failed to make a contemporaneous objection, for reasons clearly stated by the First Circuit:

This court has consistently construed Rule 51 to require that objections to the instructions be raised after the charge to the jury, in order to give the judge an opportunity to correct the error. This rule applies to special interrogatories as well as verbal instructions. . . . As we have repeatedly stated, the use of special interrogatories puts the parties on notice that there might be an inconsistent verdict. "If a slip has been made, the parties detrimentally affected must act expeditiously to cure it, not lie in wait and ask for another trial when matters turn out not to their liking."

*Phav v. Trueblood, Inc.*, 915 F.2d 764, 769 (1st Cir. 1990) (citations omitted). In any event, the Court clarified and cured any deficiency in the verdict form.

What defendants do suggest is that this court must accept the jury's original finding as to question 1, that plaintiff failed to prove that the reason for termination

proffered by the City was pretextual, even though it was arguably inconsistent with the answer to question 3.

Precedent "favors resubmission of a contradictory verdict." *Hafner v. Brown*, 983 F.2d 570, 575 (4th Cir. 1992). See, e.g., *Los Angeles v. Heller*, 475 U.S. 796, 804 n.14, 106 S. Ct. 1571, 1577 n.14 (1986) (Stevens, J., dissenting) (citing cases); *Hauser v. Kubalak*, 929 F.2d 1305, 1308 (8th Cir. 1991). Some judges would go so far as to say that a district court is *obliged* to resubmit a contradictory verdict to the jury. See *Heller*, 475 U.S. at 804, 106 S. Ct. at 1577 (Stevens, J. dissenting) ("[U]pon receiving an apparently inconsistent verdict, the trial judge has the responsibility not to retain half of the verdict, but to resubmit the question to the jury."); *Hafner, supra* ("If the district judge concludes that an inconsistent verdict reflects jury confusion or uncertainty, he or she has the duty to clarify the law governing the case and resubmit the verdict for a jury decision."). This court concludes that, at the very least, it was under no obligation to accept the first submitted verdict form as final, and exercised its discretion in clarifying any inconsistency.

#### B. Absolute Legislative Immunity

Each of the defendants claims to be shielded by absolute legislative immunity. Plaintiff counters that the jury had reason to find that the acts resulting in the elimination of her position were administrative in nature, and therefore not protected by absolute immunity. All parties agree that this dispute should be resolved by applying the two tests outlined in *Cutting v. Mazzei*, 724 F.2d 259 (1st Cir. 1984):



The first test focuses on the nature of the facts used to reach the given decision. If the underlying facts on which the decision is based are "legislative facts," such as "generalizations concerning a policy or state of affairs," then the decision is legislative. If the facts used in the decisionmaking are more specific, such as those that relate to particular individuals or situations, then the decision is administrative. The second test focuses on the "particularity of the impact of the state of action." If the action involves establishment of a general policy, it is legislative; if the action "single[s] out specifiable individuals and affect[s] them differently from others," it is administrative.

*Id.* at 261 (quoting *Developments in the Law - Zoning*, 91 Harv. L. Rev. 1427, 1510-11 (1978)).

Two First Circuit cases have applied the *Cutting* tests. In *Vacca v. Barletta*, 933 F.2d 31, 33 (1st Cir. 1991), the court held that the acting chairperson of a school board was exercising an administrative function when he decided to eject a rowdy school committee member during a debate as to whether, or how, money could be found to cover the cost of hiring 7 new teachers. Consequently, the court reasoned, even if a defendant is entitled to absolute immunity for legislative functions, absolute immunity did not apply. *Id.*

Considerably closer to home is the case of *Acevedo-Cordero v. Cordero-Santiago*, 958 F.2d 20 (1st Cir. 1992). *Acevedo-Cordero* dealt with a city ordinance, proposed by the mayor and passed by the assembly, which purported to eliminate about 600 positions in the city government as a result of a financial crisis. *Id.* at 21, 23. The ordinance

identified specific positions, and by extension, particular employees. Defendants were the mayor, the secretary of human resources, the members of the city assembly, and the city assembly. Plaintiffs claimed that the adoption of the ordinance was a device to discharge them solely because of their political affiliations. The First Circuit joined eight other circuits in holding that absolute immunity protects purely local legislative acts but held that it was a fact question for the jury whether the facially neutral, legislative, cost-cutting ordinance attacked in *Acevedo-Cordero* was simply a ruse, masking a politically-motivated administrative purge of individuals with a certain party affiliation. *Id.* at 23. The upshot is that, in this circuit, the administrative or legislative nature of an employment decision accomplished through traditional legislative functions is a question for the jury. *Contrast Rateree v. Rockett*, 852 F.2d 946, 950 (7th Cir. 1988) (applying the doctrine of absolute immunity to legislators who passed ordinance eliminating municipal positions from the city budget although there was evidence the adverse budget action was targeted specific individuals for political reasons).

Here, none of the parties requested a special jury interrogatory to determine the applicability of the doctrine of absolute legislative immunity. Although it was discussed in the charge conference, all counsel agreed that the fact questions framed by *Acevedo-Cordero* were presented to the jury in the special verdict form by questions one through three, the questions which asked the jury to decide the reasons for the termination of the position. In this case, as counsel recognized, the *Acevedo-Cordero* question is intertwined with the merits. With

respect to the first *Cutting* test, the jury explicitly found that plaintiff had proven the neutral legislative reason proffered by the City – budgetary concerns – was pretextual, and that a substantial or motivating factor was to punish plaintiff's speech. *See infra* Part D.2 (discussing supporting evidence).

With respect to the second *Cutting* test, the undisputed evidence was that the ordinance eliminating the department, although facially neutral, had a particularized impact on plaintiff, the only person employed by the department. Naturally implicit in this combination of findings is the finding that the ordinance amendment passed by the city council was an individually-targeted administrative act, rather than a neutral, legislative elimination of a position which incidentally resulted in the termination of plaintiff. This court therefore concludes that defendants are not shielded by absolute immunity.

### C. Insufficient Evidence

After a discussion of the applicable burden structure, the evidence supporting the verdict will be examined.

#### 1. The Significance of Rejecting the Proffered Reason

In the verdict form accepted by this court, the jury explicitly rejected the neutral reason for plaintiff's termination proffered by the defendants. Plaintiff argues that, under the applicable standard, this finding alone, if supported by the evidence, would permit the further finding of liability under Count II, that plaintiff had met her

initial burden of persuasion that the plaintiff's protected conduct was a substantial or motivating factor in her effective termination because there was no evidence of any other motivation.

Plaintiff relies primarily on the First Circuit case of *Acevedo-Diaz v. Aponte*, 1 F.3d 62 (1st Cir. 1993). *Acevedo-Diaz* forthrightly stated that the plaintiff's burden in employment discrimination claims grounded in the First Amendment and section 1983 (claims such as Count II) is different from the burden applicable to employment discrimination cases brought under Title VII of the Civil Rights Act. The First Circuit explained:

[T]he plaintiff-employee in a Title VII case "retains the burden of persuasion at all times."

By contrast, under the *Mt. Healthy* burden-shifting mechanism applicable to a First Amendment political discrimination claim, the *burden of persuasion itself passes to the defendant-employer* once the plaintiff produces sufficient evidence from which the fact finder reasonably can infer that the plaintiff's protected conduct was a "substantial" or "motivating" factor behind her dismissal. Accordingly, once the burden of persuasion shifts to the defendant-employer, the plaintiff-employee will prevail unless the fact finder concludes that the defendant has produced enough evidence to establish that the plaintiff's dismissal would have occurred in any event for nondiscriminatory reasons.

*Acevedo-Diaz*, 1 F.3d at 67 (emphasis in original) (interpreting *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 286, 97 S. Ct. 568 (1977)).



Although *St. Mary's* is inapplicable to Count II, its analysis is helpful. The *St. Mary's* court rejected in sweeping terms the suggestion that the plaintiff's case was necessarily proven by a showing that the defendant's proffered explanation was pretextual. See \_\_\_ U.S. \_\_\_ at \_\_\_; 113 S. Ct. at 2751. Nevertheless, even under *St. Mary's*, "rejection of the defendant's proffered reasons[ ] will permit the trier of fact to infer the ultimate fact of intentional discrimination, and. . . upon such rejection, '[n]o additional proof of discrimination is required.'" \_\_\_ U.S. \_\_\_ at \_\_\_ 113 S. Ct. at 2749 (emphasis in original) (citations omitted).

In light of *Acevedo-Diaz*, this court agrees with plaintiff that in the circumstances of this case, rejection of the proffered reason as pretext would permit the jury to infer that the punishment for protected speech was a substantial or motivating factor for the passage of the ordinance, because there was no evidence of any other motivation, and there was circumstantial evidence of the motivation of the mayor and city councilors.

## 2. Evidence Supporting Rejection of Proffered Reason

Defendants Bogan, Connors, and Roderick all testified that the reason for the action was the perceived need to save money created by the prospect of a cut in state aid the following year; and that the action was part and parcel of a cost-cutting package that eliminated 135 positions and froze the salaries of city employees.

Plaintiff points to the following evidence that, if credited and given weight by the jury, would negate defendants' witnesses' testimony. First, in early 1991, the mayor presented a budget message to the city council that actually projected an *increase* in state aid from the prior year. Second, it cost the City more money to hire the three people to replace her than it would have to continue her employment. Third, Mayor Bogan refused to examine an alternative method of achieving budgetary savings proposed by the plaintiff. Fourth, at the time of the proposed elimination of plaintiff's position (February 1991) no other position had been identified for elimination, and for the next three months no one else was informed of their termination. Fifth, a letter dated May 7, from Sharon Skeels to Mayor Bogan, which purported to list those positions eliminated as part of the budget cut-back, made no mention of plaintiff's position.

This court concludes that there existed evidence upon which a rational jury could conclude that budgetary constraints were not the true reason for defendants' actions. It now remains to be seen what evidence existed to suggest that defendants' true reason was illicit – to suggest that retaliation for plaintiff's expression of her opinions was a substantial or motivating factor for the actions of the city.

## 3. Evidence Produced to Show Bogan's Wrongful Intent

Defendant Bogan argues that there was insufficient evidence upon which a jury could find that he was impermissibly motivated in proposing to the city council that

Scott-Harris' position be eliminated. He fairly points out that there was no direct evidence that he even knew about the disciplinary proceedings against Biltcliffe at the time he recommended eliminating Scott-Harris' position.

However, there was sufficient circumstantial evidence from which the jury could conclude by a preponderance of the evidence that a substantial or motivating factor in his decision to propose an ordinance eliminating her position was to retaliate against her for attempting to terminate Biltcliffe. There was evidence that Biltcliffe had been a longtime city worker who knew Bogan, that she was vociferous in denouncing Scott-Harris to all, including Bogan's friend Roderick, that Biltcliffe used political connections extensively to stop the investigation into her conduct, that Bogan had in fact intervened to shorten Biltcliffe's suspension, that Scott-Harris was doing a great job, that she was the only management employee laid off as a result of the expected decrease in local aid, that she was notified three months before the 134 other people let go, and that Bogan persisted in deciding to let her go over the opposition of the city manager. Moreover, there was evidence that the budgetary reason was a pretext, and that Scott-Harris' termination resulted in an increase, not decrease, in municipal expenditures.

Most significantly, the circumstances of plaintiff's termination support the inference that Bogan was trying to drive her out of city hall. For example, Bogan declined to let her combine two positions – the functions of which she had already been performing – to let her keep her current salary level. Then, when she accepted the position of Director of Public Health at a \$12,000 cut in salary, he increased the job responsibilities and shifted her to a less

desirable office. Finally, even assuming he believed she had rejected the position in the letter of March 4, he promptly knew that she was retracting her rejection and wanted to accept the job; yet he refused to allow her to stay despite contacts from an attorney. As Bogan himself testified that Scott-Harris was a good employee, the jury could reasonably have disbelieved his testimony concerning his motive for proposing the elimination of her position and inferred that his real reason for precipitating her departure through this series of hostile moves was to get rid of someone he perceived to be a boat-rocker.

#### 4. Evidence Produced to Show Roderick's Wrongful Intent

The case against Roderick is even stronger, as there was direct evidence that she was aware of the Biltcliffe disciplinary hearings; that Biltcliffe had contacted Roderick before to intervene on her behalf when Biltcliffe believed Scott-Harris was unfair to her in not recommending a salary increase; that Biltcliffe had contacted her again to intervene when Scott-Harris had informed Biltcliffe about the charges against her justifying termination; that Roderick in fact spoke to Connors about the Biltcliffe investigation; and that Roderick and Scott-Harris had already had a contumacious disagreement over charges by Scott-Harris that Roderick had made an inappropriate racial comment during an interview. This direct evidence, in combination with the evidence refuting the financial need for the elimination of the position, supports the jury finding.



#### D. The City

The verdict against the City of Fall River is supportable only if plaintiff produced evidence showing that punishing her for the exercise of her free speech rights was a substantial or motivating factor in the city's action. The court instructed the jury, without objection, that "the city" was to be defined as "the Mayor and a majority of the City Council." Defendants now argue that, to carry its burden of proof, the plaintiff was obliged, as a matter of law, to prove that five individual legislators who voted in favor of the ordinance amendment (those five constituting a majority of the city council) were motivated by an intention to violate her free speech rights. They further argue that evidence of intent was submitted only as to Mayor Bogan and Councillor Roderick.

##### 1. Municipal Liability

Before addressing defendants' argument concerning the proper method of proving collective intent, it may be helpful to clarify why the court may not resort to the expedient of directly imputing liability to the city from the individual actions of Bogan and Roderick. Although municipalities are considered "persons" within the meaning of section 1983, the constitutional deprivation must have its origin in a policy of a municipality. *Monell v. City of New York Dept. of Social Services*, 436 U.S. 658, 694, 98 S. Ct. 2108, 2037 (1978). Municipalities cannot be held liable on a theory of *respondeat superior*. *Monell*, 436 U.S. at 691, 98 S. Ct. at 2036.

In *Pembaur v. Cincinnati*, 475 U.S. 469, 480-83 & n.12, 106 S. Ct. 1292, 1298-1300 & n.12, the Supreme Court articulated the following test for determining what acts of a municipal officer triggers municipal liability under section 1983: (1) acts which the municipality officially sanctioned or ordered such as a decision of a properly constituted legislative body like a city council; (2) acts of municipal officers with final policy-making authority, as defined by state law; and (3) acts taken pursuant to a policy adopted by the official or officials responsible under state law for making policy in that area.

A municipal official's actions subject to review procedures do not amount to a complete delegation of authority so as to trigger section 1983 liability. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 125, 108 S. Ct. 915, 924 (1988). Accordingly, even where a city charter establishes a "strong mayor" type government, a mayor is not the ultimate policy making authority where the city charter gives the city council the power to override the mayor's veto. See, e.g., *Manor Health Care Corp. v. Lomelo*, 929 F.2d 633, 637 (11th Cir. 1991) (even where a mayor's de facto powers cause the city council to defer in substantial part to his judgment with respect to zoning, the mayor does not become a final policy maker with regard to zoning where the city council has the power to review and veto the zoning ordinance.); *Worshan v. City of Pasadena*, 881 F.2d 1336, 1340 (5th Cir. 1989) (mayor's action of indefinitely suspending city employees was not the act of the city because the city council was empowered to review the decision of city officers); *Williams v. Butler*, 863 F.2d

1398, 1404 (8th Cir. 1988) (en banc) (an incomplete delegation of authority *i.e.*, where the right of review is retained, will not result in municipal liability).

The Charter of the City of Fall River, Article II, Sections 18, 20 and 21, provides that a majority of all members of the city council shall be necessary to adopt any ordinance; and that every ordinance adopted by the city council must be presented to the mayor for his approval. If the mayor approves it, the ordinance shall be in force. If he disapproves the ordinance, the city council must pass the ordinance by a two-thirds vote of all its members to be in force. *See generally* Mass. Gen. Laws ch. 43, § 55.

As the mayor and city council shared the decision as to the elimination of a department by ordinance, and there was no evidence that the city developed a custom or practice which allowed the mayor to function without any supervision or review regarding such issues, the municipality is liable only if plaintiff proves the mayor and majority of city councillors were impermissibly motivated. The municipality is not liable under *Monell* and *Pembaur* for the individual actions of Roderick and Bogan, because they did not have final policy-making authority.

## 2. Legislative Intent

Directly inquiring into the subjective intent of a legislative body is a famously "perilous enterprise," and is ordinarily disfavored in constitutional law. *See, e.g., Edwards v. Aguillard*, 482 U.S. 578, 636-39, 107 S. Ct. 2573,

2605-07 (1987) (Scalia, J., dissenting) (discerning the subjective motivation of those enacting the statute is, to be honest, almost an impossible task"); *Palmer v. Thompson*, 403 U.S. 217, 225, 91 S. Ct. 1940, 1945 (1971); *United States v. O'Brien*, 391 U.S. 367, 383, 88 S. Ct. 1673, 1682 (1968); *South Carolina Educ. Ass'n v. Campbell*, 883 F.2d 1251, 1257-62 (4th Cir. 1989).

The ordinance at issue here, because it is alleged to infringe a particular individual's fundamental right, would fall into that exceptional class of cases where it is appropriate to admit the testimony of individual legislators, including the mayor and vice president of the city council, concerning legislative intent. *See F.O.P. Lodge No. 121 v. City of Hobart*, 864 F.2d 551, 555 (7th Cir. 1988) (Posner, J.). But even in such cases, it is recognized that the value of direct testimony by legislators is distinctly limited.

In its most extensive rumination on the nature of evidence tending to show that a piece of legislation is wrongfully motivated, the Court noted that, even when unprotected by privilege, individual legislators will be asked to testify only "[i]n some extraordinary instances." *Village of Arlington Hts. v. Metropolitan Housing Dev.*, 429 U.S. 252, 265-69, 97 S. Ct. 555, 563-65 (1977). More usually, wrongful legislative intent will be shown more indirectly, for instance through the effects of the legislation, the history of the legislation, patterns of similar legislative acts, and the sequence of events leading up to the legislation. *Id.* Justice Stevens made this point aptly in another case involving a challenge to legislation on the grounds of racial discrimination:



Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds. This is particularly true in the case of governmental action which is frequently the product of compromise, of collective decisionmaking, and of mixed motivation.

*Washington v. Davis*, 426 U.S. 229, 253, 96 S. Ct. 2040, 2054 (1977) (Stevens, J., concurring).

Given the known difficulties in assessing the subjective intent of legislative decision-makers, some courts have held, in the state employment rights context, that a fact-finder can reasonably infer discriminatory intent of a governmental body based on circumstantial evidence of discriminatory intent of members of that body, particularly those in leadership positions in the collective decision-making. See *Southern Worcester Cty. v. Labor Relations Comm'n*, 386 Mass. 414, 421, 436 N.E.2d 380, 385 (1982) ("[I]t is not fatal to the teachers' claims that only three of the seven members of the school committee made antiunion statements [as well as the superintendent who recommended the decision not to reappoint the teachers to the committee]. We adhere to the rule that adequate proof in civil and criminal cases may come from either direct or circumstantial evidence, or both."); *Northeast Met. Reg. Vocational Sch. Comm. v. Massachusetts Comm'n Against Discrimination*, 31 Mass. App. Ct. 84, 89, 575 N.E.2d 77, 81 (1991) ("While it is true that the committee was comprised of twelve members and there was direct evidence of sexual bias exhibited by only two of its members [the

chairman of the selection committee and of the committee itself], this is not fatal to the complainant's case. The complainant can establish proof of gender discrimination by direct or circumstantial evidence or both.") (citations omitted).

Finally, it is well established that, as a general matter, to prove discriminatory animus in the analogous area of Title VII claims, a plaintiff may rely on circumstantial evidence. See *Mesnick v. General Electric Co.*, 950 F.2d 816, 824 (1st Cir. 1991), *cert. denied*, \_\_\_ U.S. \_\_\_, 112 S. Ct. 2965 (1992) ("To prove the [employer's] discriminatory animus, [the] plaintiff is not required to come forward with evidence of the 'smoking gun' variety."); see also *Connell v. Bank of Boston*, 924 F.2d 1169, 1175 (1st Cir. 1991) (similar); *Herbert v. Mohawk Rubber Co.*, 872 F.2d 1104, 1115 (1st Cir. 1989) ("Circumstantial evidence is expected in discrimination cases given the complexity of the issues and the difficulty, in this rights conscious era, of producing direct evidence of discrimination."); see also *Resare v. Raytheon Corp.*, 981 F.2d 32, 42 (1st Cir. 1992) (similar).

### 3. Evidence Produced to Show the City's Wrongful Intent

Defendants emphasize that there was no direct evidence about the motivation of the majority of the city council. Even if the mayor and vice chairperson of the city council were impermissibly motivated, under *Pembaur* and its progeny Fall River is not liable unless a majority of the city council was similarly motivated. Accordingly, if the desire to punish Scott-Harris for her

speech were a hidden agenda of the individual defendants, and the majority of the city council voted for purely budgetary reasons, the city would not be liable. However, to prevail plaintiffs may rely on circumstantial evidence of the motivation of a majority of the city councilors. It is too high a burden to place on a civil rights plaintiff to require her to present direct evidence of motivation of a majority of a legislative body.

While it is a close question, the jury could reasonably have inferred that a substantial or motivating factor in the city's decision to eliminate the position was punishment for protected speech based on the following circumstantial evidence. First, there was no alternative explanation considered by the jury to be plausible. Second, two highly influential figures, the mayor and vice chair of the city council, were impermissibly motivated. Third, two other city councilors were aware of the controversy – one telephoned Roderick to discuss the Biltcliffe affair in connection with the vote to eliminate the department, and a second talked with plaintiff about the same matter. Fourth, there was evidence showing Biltcliffe to be a person who habitually and vociferously sought to exercise political influence. Fifth, the vote to eliminate the department occurred at a time when the Biltcliffe controversy was at its peak. Sixth, the only practical effect of the department elimination was to terminate plaintiff. Seventh, the city later took another action, by assent of the mayor and a majority of the city council, that redounded to Ms. Biltcliffe's personal benefit – namely, the creation of a new position for her in the 1992 budget, characterized by plaintiff as a sinecure.

### ORDER

For the foregoing reasons, the Motion of the Defendant, the City of Fall River, for Judgment Notwithstanding the Verdict Pursuant to Fed.R.Civ.P. 50(b) (Docket No. 86) is denied. The Motion of the Defendant, Marilyn Roderick, for Judgment Notwithstanding the Verdict Pursuant to Fed.R.Civ.P. 50(b) (Docket No. 90) is denied. The Motion of the Defendant, Daniel Bogan, for Judgment Notwithstanding the Verdict Pursuant to Fed.R.Civ.P. 50(b) (Docket No. 92) is denied.

/s/ Patti B. Saris  
PATTI B. SARIS  
 United States District Judge

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## APPENDIX B

UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

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Nos. 95-1950  
95-1951  
95-1952

JANET SCOTT-HARRIS,  
Plaintiff, Appellee,

v.

CITY OF FALL RIVER, ET AL.,  
Defendants, Appellants.

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No. 95-2100

JANET SCOTT-HARRIS,  
Plaintiff, Appellant,

v.

CITY OF FALL RIVER, ET AL.,  
Defendants, Appellees.

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JUDGMENT

Entered: January 15, 1997

These causes came on to be heard on appeals from the United States District Court for the District of Massachusetts, and were argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The plaintiff's cross-appeal (No. 95-2100) is denied and the district court's



order permitting the reopening of the appeal period is affirmed. The judgment against the City of Fall River is reversed, and the fee award against it is vacated. The judgments against the remaining defendants are affirmed and the case is remanded to the district court for further proceedings in respect to both the previous fee award against these defendants and the question of fees on appeal. No costs are awarded in Nos. 95-1950 and 95-2100; costs are awarded to the plaintiff in Nos. 95-1951 and 95-1952.

By the Court:  
WILLIAM H. NG  
Clerk.

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**United States Court of Appeals  
For the First Circuit**

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Nos. 95-1950  
95-1951  
95-1952

JANET SCOTT-HARRIS,  
Plaintiff, Appellee,

v.

CITY OF FALL RIVER, ET AL.,  
Defendants, Appellants.

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No. 95-2100

JANET SCOTT-HARRIS,  
Plaintiff, Appellant,

v.

CITY OF FALL RIVER, ET AL.,  
Defendants, Appellees.

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APPEALS FROM THE UNITED STATES DISTRICT  
COURT FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Patti B. Saris, U.S. District Judge]

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Before

Selya, Circuit Judge,  
Aldrich, Senior Circuit Judge,  
and Boudin, Circuit Judge.

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Harvey A. Schwartz, with whom Schwartz, Shaw & Griffith was on brief, for plaintiff.

Stephen C. Fulton, with whom Law Office of Bruce R. Fox was on brief, for defendant City of Fall River.

Bruce A. Assad for defendant Marilyn Roderick.

Robert J. Marchand, with whom Driscoll, Marchand, Boyer & Stanton and Mary E. O'Neil were on brief, for defendant Daniel Bogan.

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January 15, 1997

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SELYA, *Circuit Judge*. Although America began with the vision of a city on a hill, not every American has shared a sense of optimism about our nation's municipalities. Indeed, one of the most illustrious of the Framers regarded great cities as "pestilential to the morals, the health, [and] the liberties of man." Christopher Tunnard, *The City of Man* 34 (1970) (quoting Thomas Jefferson).

In this vein, American legal institutions have begun over time to view cities with a certain constitutionally based suspicion. Thus, in *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658, 691 (1978), the Supreme Court ruled that municipalities could be held liable under 42 U.S.C. § 1983 for deprivations of federally protected rights which occurred "pursuant to official municipal

policy of some nature."<sup>1</sup> *Monell* opened the floodgates for an outpouring of such suits against municipalities.

The case at hand is one example of the genre. At trial, a jury found the City of Fall River (the City) and two municipal officials liable under section 1983 for the passage of a facially neutral ordinance that abolished the plaintiff's job. The defendants' appeals raise a tantalizing question about whether a discriminatory animus displayed by fewer than the minimum number of city council members whose votes would be required to enact an ordinance can (or should) be imputed to the municipality itself. Other interesting questions abound, including questions dealing with causation in the context of constitutional torts and the availability of legislative immunity defenses in that setting. Before addressing any of these issues, however, we must parse Fed. R. App. P. 4 (a)(6) for the first time and determine whether the defendants have brought their appeals in a timely fashion.

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<sup>1</sup> The statute provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1994). The upshot of the *Monell* decision is that a municipality is a "person" for purposes of section 1983, and, hence, amenable to suit for violations thereof. See *Monell*, 436 U.S. at 690.



## I. A TALE OF ONE CITY

Many of the facts in this case are conflicted. We present them as best they have presented themselves, occasionally resolving disparities as the jury permissibly might have done. See, e.g., *Veranda Beach Club Ltd. Partnership v. Western Sur. Co.*, 936 F.2d 1364, 1375 (1st Cir. 1991) (discussing standard for appellate review of post-verdict challenges to evidentiary sufficiency).

The City hired the plaintiff, Janet Scott-Harris, as the administrator of the newly created Department of Health and Human Services (HHS). When Scott-Harris entered the City's service in 1987, she became the first African-American ever to hold a managerial position in the municipal government. By all accounts she performed quite well at HHS. Withal, she did not enjoy a problem-free relationship with the City's political hierarchs. In 1988, for example, she clashed with Marilyn Roderick, the vice-president of the City Council. Scott-Harris believed that Roderick made inappropriate references to an aspirant's ethnicity in the course of an employment interview and stormed out of the room. Shortly thereafter, she engaged in a shouting match with Roderick. When Scott-Harris subsequently attempted to apologize, Roderick hung up the telephone.

Scott-Harris' difficulties with Roderick did not end with the aforescribed incident. There were periodic flare-ups – by way of illustration, Roderick wrote a letter to the City Administrator, Robert Connors, protesting Scott-Harris' use of a City-owned motor vehicle – but it was Scott-Harris' reaction to the dysphemisms spouted by Dorothy (Dot) Biltcliffe, a nutrition program assistant

for the City's Council on Aging (COA), that precipitated internecine warfare. In the fall of 1990, Scott-Harris learned that Biltcliffe had been making offensive comments. In one instance, referring to her co-worker Paula Gousie and to Scott-Harris, Biltcliffe remarked: "That little French bitch has her head up that nigger's ass." In another, Biltcliffe referred to a secretary as "a little black bitch." Scott-Harris spoke out against this racist invective and, because COA operated under her general supervision, she consulted with Connors and then drew up a set of charges against Biltcliffe as a prelude to dismissal.

The pendency of these charges did not improve Biltcliffe's manners; she called Scott-Harris "a black nigger bitch" and warned that there would be repercussions because Biltcliffe "knew people." Biltcliffe unabashedly pressed her case with two city councilors (Roderick and Raymond Mitchell) and a state senator who, in turn, called Roderick. After numerous postponements the City held a hearing on March 27, 1991. This resulted in a settlement under which Biltcliffe agreed to accept a 60-day suspension without pay. Mayor Daniel Bogan subsequently intervened and pared the punishment substantially.

During this time frame the City's financial outlook worsened. Municipal officials anticipated that state aid would decline up to 10% in the next fiscal year (July 1, 1991 to June 30, 1992). Mayor Bogan directed Connors to prepare a list of proposed budget cuts to accommodate the anticipated reduction in funding. Connors asked his department heads, including Scott-Harris, for their input. Scott-Harris recommended reducing the hours of school nurses. Bogan rejected this suggestion and, over Connors'

objection, insisted that Scott-Harris' position be eliminated.

Because the post had been created by municipal ordinance, its abolition necessitated the same procedural formalities. The City Charter requires the votes of a majority of the nine members of the City Council for passage of such an ordinance. The mayor often submits proposed legislation to the City Council, and, in addition, he must approve every enacted ordinance (or else the Council must override his veto). In February 1991 Bogan asked the Council to do away with Scott-Harris' position. On March 5 the ordinance committee, chaired by Roderick, reported out an emendatory ordinance designed to achieve this end and recommended its passage. Three weeks later the City Council voted six-to-two (Roderick voting with the majority) to approve the position-elimination ordinance. Bogan signed it into law.

At about the same time that he moved to incinerate Scott-Harris' job, Bogan offered her a different portfolio - Public Health Director - which paid approximately \$12,000 less per annum. Scott-Harris accepted the offer by letter dated February 28, 1991, but a follow-up communique from Bogan added extra duties and shifted Scott-Harris to a less desirable office. Disappointed, Scott-Harris drafted a letter rejecting the job offer. That letter mysteriously arrived at the mayor's office and was acted upon by Bogan despite Scott-Harris' efforts to retract it. Scott-Harris' tour of duty with the City ended on March 29, 1991 - two days after the hearing that led to Biltcliffe's suspension. She filed suit several months later.

## II. THE LITIGATION

Solon, the fabled Greek legislator, once characterized the best type of city as one "in which those who are not wronged, no less than those who are wronged, exert themselves to punish the wrongdoers." Plutarch, *Plutarch's Lives* 455 (Bernadotte Perrin trans., 1914). Here, the plaintiff's complaint alleged in substance that the City and certain municipal officials<sup>2</sup> inverted the Solonic ideal: when the plaintiff responded forcefully (but appropriately) to Biltcliffe's racial slurs, the defendants sided with the wrongdoer and instead punished Scott-Harris by ousting her from her position under a blatant pretext. The plaintiff alleged that, in so doing, the defendants abridged her First Amendment rights and set the stage for redress under section 1983. *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977) (explaining that in order to prevail on a section 1983 claim based on the First Amendment, the plaintiff must prove that her protected speech was a substantial or motivating factor in the decision to eliminate her job).

At trial the defendants asserted that their motives in passing the challenged ordinance were exclusively fiscal. The plaintiff disagreed, contending that racial animus and a desire to punish her for protected speech, not

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<sup>2</sup> The plaintiff originally sued a plethora of defendants. She quickly narrowed the field to Connors, Roderick, Bogan, and the City. During the ensuing trial, the judge directed a verdict in Connors' favor. The plaintiff has not contested that ruling, and we discuss these appeals as if Bogan, Roderick, and the City were the sole defendants.



budgetary constraints, spurred the introduction and passage of the ordinance. On May 26, 1994, evidently persuaded by the plaintiff's efforts to connect Dot to her dismissal, the jury returned a verdict against all three defendants.<sup>3</sup>

The verdict form memorialized the jury's conclusions (1) that the plaintiff's constitutionally protected speech was a substantial or motivating factor both in Bogan's decision to recommend enactment of the ordinance and in Roderick's decision to work for its passage, and (2) that these actions proximately caused the extirpation of the HHS director's position. As originally returned, the verdict form added an inconvenient wrinkle; it indicated that the plaintiff had not proven that the City's professed desire to enact the ordinance for budgetary reasons was pretextual. Out of the jury's earshot, the judge expressed her concern that the jury's findings were internally inconsistent. After a brief colloquy, she resubmitted the case to the jury with appropriate supplemental instructions. Shortly thereafter the jury returned a revised verdict form which reiterated everything except the "no pretext" finding. In that wise, the jury, having reconsidered the matter, now concluded that the City's stated reason for wanting the ordinance – budgetary concerns – was not its true reason.

The jury assessed compensatory damages against all three defendants, jointly and severally, in the amount of \$156,000; found Bogan liable for punitive damages in the

<sup>3</sup> The jury found against the plaintiff on her race discrimination claim, and she does not contest that finding here.

amount of \$60,000; and found Roderick liable for punitive damages in the amount of \$15,000.<sup>4</sup> The court subsequently denied the defendants' motions for judgment notwithstanding the verdict. These appeals followed – but not without a perturbing procedural prelude.

### III. THE NOTICES OF APPEAL

Rule 4(a)(1) of the Federal Rules of Appellate Procedure requires that notices of appeal "be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from." Compliance with this rule is mandatory and jurisdictional; while a court may construe the rule's strictures liberally, it may not wink at them. See *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 315 (1988); *Air Line Pilots Ass'n v. Precision Valley Aviation, Inc.*, 26 F.3d 220, 223 (1st Cir. 1994).

In this instance the district court entered the appealable order – the order denying the defendants' post-trial motions for judgment n.o.v. – on January 30, 1995. The defendants did not file their notices of appeal until August of that year. Without more, Rule 4(a)(1) would bar the maintenance of these appeals.

The appeal period denominated by Rule 4(a)(1) is, however, subject to an occasional exception. One such

<sup>4</sup> Although punitive damages may lie against individuals in a section 1983 action, see, e.g., *Keenan v. City of Philadelphia*, 983 F.2d 459, 469-70 (3d Cir. 1992); *Davet v. Maccarone*, 973 F.2d 22, 27 (1st Cir. 1992), they are not available against a municipality. See *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981).

exception, added to the Appellate Rules in 1991, provides:

The district court, if it finds (a) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry and (b) that no party would be prejudiced, may, upon motion filed within 180 days of entry of the judgment or order or within 7 days of receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of the entry of the order reopening the time for appeal.

Fed. R. App. P. 4(a)(6). The mention of "notice" in Rule 4(a)(6) is a reference to Fed. R. Civ. P. 77(d), which provides:

Immediately upon the entry of an order or judgment the clerk shall serve a notice of entry by mail in the manner provided for in Rule 5 upon each party who is not in default for failure to appear, and shall make a note in the docket of the mailing. Any party may in addition serve a notice of such entry in the manner provided in Rule 5 for the service of papers. Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 4(a) of the Federal Rules of Appellate Procedure.

These rules lie at the center of the jurisdictional jumble that confronts us. On the defendants' motions, the district court held a hearing and determined that Fed. R. App. P. 4(a)(6) appropriately could be invoked to excuse

the defendants' seeming tardiness. The plaintiff's cross-appeal challenges this determination. Because Rule 4(a)(6) is relatively new, we have not yet had occasion to construe it. We do so today, deciding at the outset that the standard of review which governs a district's court's determinations under Rule 4(a)(6) is abuse of discretion. *Accord Nunley v. City of Los Angeles*, 52 F.3d 792, 794 (9th Cir. 1995).

Certain elements of the Rule 4(a)(6) calculus are essentially undisputed: the defendants were parties entitled to notice of the entry of the appealable final order; their Rule 4(a)(6) motions, filed on April 10 and 11, 1995, came within 180 days of the entry of that order; and no party would be subjected to cognizable prejudice by the granting of the motions. Thus, the decisive questions in this case relate to whether the defendants received notice of the entry of the order within 21 days, and if not, whether they filed their Rule 4(a)(6) motions within seven days of the time when they eventually received such notice.

Both of these questions involve an appreciation of the kind of notice that Rule 4(a)(6) contemplates. In terms, Rule 4(a)(6) advances a unitary concept of notice; its two references to "such notice" plainly relate back to the phrase "notice of the entry of a judgment or order." The problem, exemplified by this case, is that the rule does not specify whether that notice must be written notice or actual notice. That problem defies facile solutions, and the courts of appeals which have addressed it thus far have not achieved consensus. *Compare Avolio v. County of Suffolk*, 29 F.3d 50, 53 (2d Cir. 1994) (holding that the rule contemplates written notice) *with Nunley*, 52 F.3d at 794



(holding that actual notice suffices) and *Zimmer St. Louis, Inc. v. Zimmer Co.*, 32 F.3d 357, 359 (8th Cir. 1994) (same). Though we acknowledge that the phrase, *simpliciter*, is susceptible of multiple interpretations, we believe that the references to "notice" in Rule 4(a)(6), taken in context, are best read as requiring written notice.

Our starting point is our perception that Appellate Rule 4(a)(6) and Civil Rule 77(d) must be read *in pari passu*. *Accord Nunley*, 52 F.3d at 795. The text of Rule 77(d) requires the clerk to serve the notice of entry of an order or judgment "by mail." Because a mailed notice is invariably written, it seems logical to conclude that when reference is made later in the text to "lack of notice of the entry," that reference contemplates lack of *written* notice.

We think that further evidence to the same effect can be gleaned from the scrivenings of the Advisory Committee. The Advisory Committee's Notes are entitled to weight in interpreting federal rules of practice and procedure. *See Whitehouse v. U.S. Dist. Ct. for Dist. of R.I.*, 53 F.3d 1349, 1364-65 (1st Cir. 1995). Here, they tell us that Rule 4(a)(6)

provides a limited opportunity for relief in circumstances where the notice of entry of a judgment or order, required to be mailed by the clerk of the district court pursuant to [Rule 77(d)], is either not received by a party or is received so late as to impair the opportunity to file a timely notice of appeal.

Fed. R. App. P. 4(a)(6), Advisory Committee's Notes. The statement "required to be mailed" refers to "notice of entry of a judgment or order," again suggesting that the

notice must be in writing. We believe that when a procedural rule uses the precise phrase employed by the Advisory Committee, it can reasonably be inferred that the phrase means the same thing in both contexts.

Policy concerns point us in the same direction. Reading Rule 4(a)(6) to require written notice will simplify future proceedings. As the familiar request to "put it in writing" suggests, writings are more readily susceptible to proof than oral communications. In particular, the receipt of written notice (or its absence) should be more easily demonstrable than attempting to discern whether (and, if so, when) a party received actual notice. Such a scheme not only takes much of the guesswork out of the equation, but also, because Rule 77(d) specifically provides that parties who do not wish to rely upon the clerk to transmit the requisite written notice may do so themselves, the scheme confers certitude without leaving a victorious litigant at the mercy of a slipshod clerk.

To sum up, we hold that written notice is required to trigger the relevant time period under Rule 4(a)(6); oral communications or other forms of actual notice will not serve. We now apply this holding to the facts at hand.

The district court found that the defendants did not receive written notice of the entry of the operative order until April 7, 1995, when the plaintiff's counsel sent them a demand letter seeking satisfaction of the judgments. The court made this finding against a backdrop of unusual events. The defendants' motions for judgment n.o.v. were argued on September 29, 1994. During that session, an unrecorded sidebar conference occurred. The court's comments at that conference left all counsel with

the distinct impression that an appealable final judgment would not enter until the court decided the plaintiff's pending application for attorneys' fees. Although the impression was mistaken, *see Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202-03 (1988) (holding that the appeal period commences once a final decision on the merits has been entered, irrespective of any claim for attorneys' fees), it proved persistent. The plaintiff's lawyer, no less than defense counsel, labored under the misimpression; he wrote to the defense team on February 2, 1995, stating in relevant part: "I received the Court's memorandum and order on the defendants' motion for J.N.O.V. The only remaining issue *before judgment can be entered* is the plaintiff's unopposed motion for attorney's fees." (Emphasis supplied).

Unbeknownst to the parties, however, the court had granted the plaintiff's motion for attorneys' fees in late 1994. The clerk entered this order on the docket but, apparently, neglected to serve copies of the order or the docket entry on counsel. To complicate matters further, when defense counsel made inquiries to the clerk in February and March of 1995 as to whether an order had been entered disposing of the fee application, the clerk said that one had not.

Last but not least, although all counsel in one way or another had actual notice of the order that denied the defendants' motions for judgment n.o.v. by February 1, 1995, cases discussing Rule 4(a)(6) differentiate between notice of an order and notice of the entry of the order, indicating that the rule contemplates the latter. *See Virella-Nieves v. Briggs & Stratton Corp.*, 53 F.3d 451, 452-54 (1st Cir. 1995). In this instance the clerk attempted to furnish

such notice, but one copy of the court's order was addressed incorrectly and returned by the Post Office as undeliverable, while another copy, plucked by a different lawyer from the clerk's office, bore no notation that it had been entered on the docket. From this tangled record the district court concluded that, though at least one defense attorney received actual notice of the entry of the order on February 24, 1995,<sup>5</sup> it was not until April 7, 1995 – when the plaintiff's attorney demanded satisfaction of the judgments – that the defendants received a written notice sufficient to animate Rule 4(a)(6). They filed their excusatory motions within seven days of their receipt of this notice.

Given these facts, and given the confused circumstances that contributed to the muddle, the district court did not abuse its discretion in finding that the requirements of Rule 4(a)(6) had been met and in reopening the time for appeal. Since the defendants all filed their notices of appeal within the 14-day period that began on August 14, 1995, when Judge Saris entered her order reopening the time for doing so, we conclude that the appeals are properly before us.

#### IV. THE VERDICT FORM

The defendants collectively assert that the district court erred in refusing to declare a mistrial when presented with the original verdict form and added impudence to injury by resubmitting the case for further

<sup>5</sup> We note, parenthetically, that even this notice came after the 21-day period specified by Rule 4(a)(6) had elapsed.



deliberation. We review the district court's denial of the defendants' motions for a mistrial for abuse of discretion. See *Clemente v. Carnicon-P.R. Mgmt. Assocs.*, 52 F.3d 383, 388 (1st Cir. 1995). We evaluate the judge's related actions, namely, her decisions to reject the original verdict form and to resubmit the matter, under the same standard of review. See *Santiago-Negron v. Castro-Davila*, 865 F.2d 431, 444 (1st Cir. 1989).

The defendants' argument on this point boils down to a claim that the district court crafted a verdict form that was structurally flawed; that the jury responded to it by returning two irreconcilable findings; and that, therefore, Judge Saris should have granted the defendants' motions for a mistrial. But it is not enough to preserve the defendants' point that, after the jury first returned with the verdict form, the defendants pounced on the perceived inconsistency and moved to pass the case. Rather, the viability of this assignment of error harks back to the circumstances surrounding the emergence of the verdict form. Although the defendants now say that the form tempted potential confusion, they failed to object when the judge initially submitted it to the jury. The failure to object to the structure of a verdict form before the jury retires, like the failure to object to any other portion of the judge's charge, constitutes a waiver. See Fed. R. Civ. P. 51; see also *Phav v. Trueblood, Inc.*, 915 F.2d 764, 769 (1st Cir. 1990) (holding that Rule 51 applies to verdict forms as well as to the trial court's oral instructions); *Anderson v. Cryovac, Inc.*, 862 F.2d 910, 918 (1st Cir. 1988) ("If a slip has been made, the parties detrimentally affected must act expeditiously to cure it, not lie in wait and ask for another trial when matters turn out not to their liking.").

We need not probe this point too profoundly, for in all events the judge handled the perceived incongruity in an agreeable manner. When a verdict appears to be internally inconsistent, the safest course – in the absence of irreparable damage, and none appears here – is to defer its acceptance, consult with counsel, give the jury supplemental instructions, and recommit the matter for further consideration. See *Hafner v. Brown*, 983 F.2d 570, 575 (4th Cir. 1992) ("If the district judge concludes that an inconsistent verdict reflects jury confusion or uncertainty, he or she has the duty to clarify the law governing the case and resubmit the verdict for a jury decision."); *Poduska v. Ward*, 895 F.2d 854, 856 (1st Cir. 1990) (deeming it "precisely correct" for a judge, faced with an unclear and inconsistent jury verdict, to provide supplemental instructions and then recommit the matter to the jury). This is exactly the course of action that Judge Saris followed. The actual instructions that she gave, first orally and then in a written response to a jury question, were unimpeachable.<sup>6</sup> We discern no error, no unfairness, and no abuse of discretion either in the judge's handling of matters related to the verdict form or in her denial of the defendants' motions for a mistrial.

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<sup>6</sup> Neither Bogan nor Roderick voiced any objection to the court's supplemental instructions. The lone objection lodged by the City challenged the judge's interchanging of "real reason" and "true reason" during her supplemental instructions. The judge understandably dismissed this objection as nitpicking, and the City (wisely, in our view) has not resuscitated it on appeal.

## V. MUNICIPAL LIABILITY

We turn now to the City's principal assignment of error. Clearly, a municipality may be held liable under section 1983 for the passage of a single ordinance or piece of legislation. *See, e.g., Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986). Although municipal liability cannot be based on the doctrine of respondeat superior in this context, *see Monell*, 436 U.S. at 691, such liability can flow from a finding that the city itself has acted through an official decision of its legislative body.<sup>7</sup> Hence, from a purely theoretical standpoint, nothing prevents a determination that, if the ordinance here in question – which was passed by a majority vote of the Fall River City Council and approved by the mayor – violates the plaintiff's First Amendment rights, then the City is liable for the violation under section 1983.

We pause at this juncture. We think it is important to note early on that the defendants have not challenged the premise, or the district judge's confirmatory ruling, that Scott-Harris' speech was protected by the First Amendment in the sense needed to give rise to a claim under section 1983. Yet the Supreme Court has laid down important restrictions: to give rise to a section 1983 action, a plaintiff's speech must have been on a matter of public concern, and her interest in expressing herself must not be outweighed by the state's interest as

<sup>7</sup> Such a decision can be manifested either through the enactment of an ordinance or through the adoption of a municipal policy. *See, e.g., Pembaur*, 475 U.S. at 479-81; *Monell*, 436 U.S. at 690. Thus, adoption-of-policy cases are pertinent to a survey of enactment-of-ordinance cases.

employer in promoting the efficiency of the services that it performs. *See Waters v. Churchill*, 114 S. Ct. 1878, 1884 (1994); *Connick v. Myers*, 461 U.S. 138, 142 (1983).

Given the Supreme Court's application of these tests in *Connick*, 461 U.S. at 147-54, one could argue that Scott-Harris' comments about, and efforts to discipline, a particular employee do not qualify as speech on a matter of public concern. We do not pursue this point because it has not been argued to us; it has, therefore, effectively been waived. We mention it, however, because we do not intend our opinion to be taken as deciding that the facts here asserted comprise protected speech.

We note, moreover, that there is another unusual twist to this case. In most similar instances, the constitutional deprivation is apparent on the face of the ordinance or in the text of the challenged municipal policy, thus eliminating any need for a predicate inquiry into the motives of individual legislators. *See, e.g., City of Oklahoma City v. Tuttle*, 471 U.S. 808, 822-23 (1985); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 251-53 (1981); *Bateson v. Geisse*, 857 F.2d 1300, 1303 (9th Cir. 1988); *Little v. City of N. Miami*, 805 F.2d 962, 967 (11th Cir. 1986); 18A James Perrowitz-Solheim et al., *McQuillin Mun. Corp.* § 53.173 (3d ed. 1993). Here, by contrast, the City enacted an ordinance which, on its face, is benign. In cases like this one, implicating the exercise of First Amendment rights, liability under section 1983 can attach to the passage of a facially benign law only if one peers beneath the textual facade and concludes that the legislative body acted out of a constitutionally impermissible motive. This is a delicate business, but this court previously has sanctioned an investigation into the motives that underlay the



enactment of a facially neutral ordinance for the purpose of assessing liability under section 1983, see *Acevedo-Cordero v. Cordero-Santiago*, 958 F.2d 20, 23 (1st Cir. 1992), and we are bound by that precedent.

Still, the accumulated jurisprudence leaves perplexing problems of proof unanswered. The baseline principle is well-settled: legislators' bad motives may be proven by either direct or circumstantial evidence. See, e.g., *United States v. City of Birmingham*, 727 F.2d 560, 564-65 (6th Cir.), cert. denied, 469 U.S. 821 (1984); *Smith v. Town of Clarkton*, 682 F.2d 1055, 1064-65 (4th Cir. 1982). But this principle speaks to the *qualitative* nature of the evidence that is gathered; it does not address the *quantitative* question. That question is best framed as follows: How many municipal legislators (or, put another way, what percentage of the legislative body) must be spurred by a constitutionally impermissible motive before the municipality itself may be held liable under section 1983 for the adoption of a facially neutral policy or ordinance? This is a difficult question, and the case law proves a fickle companion.

Some courts appear to have held that the plaintiff must adduce evidence sufficient to show that a majority of the members of the legislative body acted from a constitutionally proscribed motive before this kind of municipal liability can attach. Often this position is implied rather than specifically articulated. See generally *United States v. City of Yonkers*, 856 F.2d 444, 457-58 (2d Cir. 1988). But some courts have been more forthcoming. In *Church v. City of Huntsville*, 30 F.3d 1332 (11th Cir. 1994), a group of homeless persons alleged that the city

had adopted a policy of excluding them from the community. The plaintiffs based their section 1983 action on the acts and statements of one individual on a five-member city council. The court observed that a single council member did not have any authority either to establish municipal policy or to bind the municipality. See *id.* at 1343-44. It therefore examined the evidence against the other four councilors, finding that two had opposed the alleged policy and that two had expressed no views on the subject. The court refused to draw an inference of discriminatory intent from the silence of council members, see *id.* at 1344 n.5, and rejected the plaintiffs' claim.

Other courts, acting principally in the areas of race and gender discrimination, have not required evidence of the motives of a majority of the legislative body before imposing liability on the municipality under section 1983. Representative of this line of cases is *United States v. City of Birmingham*, 538 F. Supp. 819 (E.D. Mich. 1982), *aff'd*, 727 F.2d 560 (6th Cir. 1984). There, the district court held a city liable for violations of the Fair Housing Act, 42 U.S.C. §§ 3604(a), 3617 (1994), based on the actions of a seven-member municipal commission which had blocked the construction of racially-integrated housing by a four-to-three vote. While opponents of the project had attributed their position to a series of articulated non-discriminatory rationales, the court looked behind their avowals and ruled, based on a combination of direct and circumstantial evidence, that racial considerations actually propelled the commission's action. 538 F. Supp. at 826-27. The court concluded that the city could be held liable for the commissioners' animus even though there was no proof of the motives of all four commissioners

who voted to kill the project; it was enough, the court suggested, if "racial considerations were a motivating factor among a significant percentage of those who were responsible for the city's [rejection of the project]." *Id.* at 828. Explicating this construct, the court indicated that a "significant percentage" would not have to encompass the entire four-person majority. *See id.* at 828-29. Noting evidence that racial concerns motivated "at least two of the four members of the majority faction," the court declared that "[t]hat fact alone may be sufficient to attribute a racially discriminatory intent to the City." *Id.* at 829.<sup>8</sup>

Two Massachusetts cases also premise municipal liability on evidence concerning less than a majority of the relevant legislative body. In *Southern Worcester County Regional Voc. Sch. Dist. v. Labor Relations Comm'n*, 436 N.E.2d 380 (Mass. 1982), the Supreme Judicial Court (SJC) upheld a lower court's finding that the plaintiffs had been discharged based on their union activity. The SJC declared that "it is not fatal to the [plaintiffs'] claims that only three of the seven members of the school committee

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<sup>8</sup> This rationale finds succor in *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1221-23 (2d Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988), in which the court of appeals held the city liable for Fair Housing Act violations. Though the city's liability derived from the actions of a 12-member city council, the court focused almost exclusively on statements by the mayor (who had only one vote on the council) and race-based opposition expressed by a few other councilors. The court did not premise its decision on a requirement that a majority of the council had acted out of impermissible motives.

made anti-union statements." *Id.* at 385. The court concluded that the three members' statements, coupled with evidence of bias on the part of the school superintendent (who had no vote), sufficed to support the finding of liability. *See id.* Similarly, in *Northeast Metro. Regional Voc. Sch. Dist. Sch. Comm. v. MCAD*, 575 N.E.2d 77 (Mass. App. 1991), a gender discrimination case involving a refusal to hire, the court noted that direct evidence of bias had been exhibited by only two of the twelve members of the school committee. *See id.* at 81. The court upheld a finding of liability based on this evidence and on statements by three other committee members that the plaintiff had been a victim of discrimination and/or had been the best qualified candidate for the job. *See id.* at 81-82.

The precedent in this area is uncertain, and persuasive arguments can be made on both sides. On the one hand, because a municipal ordinance can become law only by a majority vote of the city council, there is a certain incongruity in allowing fewer than a majority of the council members to subject the city to liability under section 1983. On the other hand, because discriminatory animus is insidious and a clever pretext can be hard to unmask, the law sometimes constructs procedural devices to ease a victim's burden of proof. *See, e.g., McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973) (establishing presumptions for use in Title VII cases); *Mesnick v. General Elec. Co.*, 950 F.2d 816, 823-24 (1st Cir. 1991) (adopting comparable format for age discrimination cases), *cert. denied*, 504 U.S. 985 (1992). Where, as here, a plaintiff alleges that a city's councilors conspired to victimize her by the pretextual passage of a facially neutral ordinance, it may be overly mechanistic



to hold her to strict proof of the subjective intentions of a numerical majority of council members.

Cognizant of these competing concerns, we eschew for the time being a bright-line rule. Rather, we assume for argument's sake (but do not decide) that in a sufficiently compelling case the requirement that the plaintiff prove bad motive on the part of a majority of the members of the legislative body might be relaxed and a proxy accepted instead. Nevertheless, any such relaxation would be contingent on the plaintiff mustering evidence of both (a) bad motive on the part of at least a significant bloc of legislators, and (b) circumstances suggesting the probable complicity of others. By way of illustration, evidence of procedural anomalies, acquiesced in by a majority of the legislative body, may support such an inference. See, e.g., *City of Birmingham*, 727 F.2d at 564-65; *Town of Clarkton*, 682 F.2d at 1066-67. By like token, evidence indicating that the legislators bowed to an impermissible community animus, most commonly manifested by an unusual level of constituent pressure, may warrant such an inference. See, e.g., *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1221-25 (2d Cir. 1987), cert. denied, 486 U.S. 1055 (1988); *City of Birmingham*, 538 F. Supp. at 824-27. The key is likelihood: Has the plaintiff proffered evidence, direct or circumstantial, which, when reasonable inferences are drawn in her favor, makes it appear more probable (i.e., more likely than not) that discrimination was the real reason underlying the enactment of the ordinance or the adoption of the policy?

The facts of this case do not require that we refine the point to any further extent. Scott-Harris has not only failed to prove that a majority of the councilors possessed

a bad motive, but she also has failed to furnish enough circumstantial evidence to ground a finding that, more likely than not, a discriminatory animus propelled the City Council's action.

The evidence, viewed most hospitably to the plaintiff,<sup>9</sup> reveals that six of the nine councilors voted in favor of the challenged ordinance and two opposed it. The plaintiff presented sufficient evidence from which a jury could deduce that one of these six, Roderick, along with Mayor Bogan (who did not have a vote), acted out of a bad motive.<sup>10</sup> The plaintiff also produced some glancing evidence apropos of Councilor Mitchell: he and Roderick were friends; Roderick spoke to him about the Biltcliffe/Scott-Harris imbroglio; and Biltcliffe called him, presumably to protest her treatment. The jury could have found from other evidence in the case that Mitchell probably voted in favor of the ordinance (although the record does not eliminate the possibility that he abstained). Even though Mitchell did not testify and the substance of his conversations with Roderick and Biltcliffe are unknown,

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<sup>9</sup> On the question of evidentiary sufficiency, we review de novo the denial of the City's motion for judgment n.o.v. *Gibson v. City of Cranston*, 37 F.3d 731, 735 (1st Cir. 1994). We are bound by the same decisional standards that bound the court below: we must evaluate the record without regard to witness credibility, testimonial conflicts, or unevenness in the weight of the evidence, see *id.*, and we must affirm unless, after surveying the evidence and the inferences derivable therefrom in the light most flattering to the plaintiff, we determine that a rational factfinder could not have resolved liability in her favor, see *Veranda Beach Club*, 936 F.2d at 1375.

<sup>10</sup> We discuss the evidence against Roderick and Bogan in Part VI(C), *infra*.

we assume *arguendo* that a jury reasonably could infer that Mitchell, too, acted for a proscribed reason.

The remaining gaps in the plaintiff's proof are considerably more difficult to overlook. None of the other seven city council members uttered any untoward statements or engaged in any suspicious actions. The "we must slash the budget" pretext had a ring of plausibility, and from aught that appears, none of these seven individuals had any way of knowing that the position-elimination ordinance would not save the City sorely needed funds. Nor is there strong circumstantial evidence of complicity; indeed, the record tells us almost nothing about the inclinations of the silent seven.<sup>11</sup> Moreover, the plaintiff made virtually no effort to adduce such evidence. She neither deposed any of the seven nor called them as witnesses at trial. She did not attempt to show that any of the other four councilors who voted for the ordinance had any basis for doubting the truth of the party line ("we must slash the budget") or that they possessed ties to Roderick or Bogan, or that they were beholden to Biltcliffe, or that they were hostile to Scott-Harris. The stark fact is that the motivations of the council members – other than Roderick and Mitchell – did not receive individualized scrutiny. By any responsible standard, this sparse evidence falls short of providing a proper predicate for a finding of municipal liability.

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<sup>11</sup> The record does show that one council member who voted against the ordinance, John Medeiros, called the plaintiff and asked why "they" were trying to get rid of her. But the plaintiff provided no insight into who "they" might be and no evidence that "they" comprised a majority, or even a significant bloc, of the City Council.

We do not think it is a coincidence that in every analogous case in which municipal liability has been imposed on evidence implicating less than a majority of a legislative body, substantial circumstantial evidence existed from which the requisite discriminatory animus could be inferred. In *City of Birmingham*, the evidence showed that the race-based opposition of constituents to integrated housing was widespread, pronounced, and vociferously articulated. After several members who supported the racially integrated development were ousted from office, the commission responded to this unrelenting pressure and took the unprecedented step of submitting the proposal to a community referendum. 538 F. Supp. at 826-29. In *Yonkers Bd. of Educ.*, the requisite inference was supported by evidence of massive constituent agitation as well as by "departures from the normal procedural sequence" in respect to the challenged proposal. 637 F.2d at 1221.

In this case no such evidence exists. Nothing suggests the City Council deviated from its standard protocol when it received and enacted the ordinance that abolished the plaintiff's job. Nothing suggests that the vote took place in an atmosphere permeated by widespread constituent pressure.<sup>12</sup> Putting speculation and surmise to one side, it simply cannot be inferred that more than two of the council members who voted to abolish the

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<sup>12</sup> The plaintiff's assertion that the publication of front-page articles about her plight in the local newspaper shows constituent coercion will not wash. There is a significant difference between heightened public interest – an environmental phenomenon with which legislatures grapple constantly – and pervasive constituent pressure.



plaintiff's position did so to punish her for protected speech. We cannot rest municipal liability on so frail a foundation. Because no reasonable jury could find against the City on the proof presented, Fall River's motion for judgment as a matter of law should have been granted.

## VI. INDIVIDUAL LIABILITY

Roderick and Bogan advance a different constellation of arguments in support of their motions for judgment n.o.v. We treat these arguments sequentially.

### A. Legislative Immunity.

The individual defendants concentrate most of their fire on the district court's rendition of the doctrine of legislative immunity. While municipalities do not enjoy immunity from suit under section 1983, see *Leatherman v. Tarrant County Narcotics Intell. & Coord. Unit*, 507 U.S. 163, 166 (1993), lawmakers have absolute immunity from civil liability for damages arising out of their performance of legitimate legislative activities. See *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951); *National Ass'n of Social Workers v. Harwood*, 69 F.3d 622, 629-30 (1st Cir. 1995). This immunity derives from federal common law and, under existing Supreme Court precedents, embraces state lawmakers, see *Tenney*, 341 U.S. at 376, and regional officials, see *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 405 (1979).<sup>13</sup>

<sup>13</sup> Members of Congress enjoy a parallel immunity from liability for their legislative acts under the Speech or Debate

The Court has yet to decide whether local legislators are protected by this strain of absolute immunity, see *Lake Country Estates*, 440 U.S. at 404 n.26 (reserving the question), but the lower federal courts, including this court, have shown no reticence in holding that the doctrine of legislative immunity is available to such persons. See, e.g., *Acevedo-Cordero*, 958 F.2d at 22-23; *Aitchison v. Raffiani*, 708 F.2d 96, 98-100 (3d Cir. 1983); *Reed v. Village of Shorewood*, 704 F.2d 943, 952-53 (7th Cir. 1983); *Bruce v. Riddle*, 631 F.2d 272, 274-80 (4th Cir. 1980). We reaffirm today that the shield of legislative immunity lies within reach of city officials.

This holding does not end our inquiry. Although legislative immunity is absolute within certain limits, legislators are not immune with respect to all actions that they take. The dividing line is drawn along a functional axis that distinguishes between legislative and administrative acts. The former are protected, the latter are not. See *Acevedo-Cordero*, 958 F.2d at 23. We have used a pair of tests for separating the two:

The first test focuses on the nature of the facts used to reach the given decision. If the underlying facts on which the decision is based are "legislative facts," such as "generalizations concerning a policy or state of affairs," then the decision is legislative. If the facts used in the decision making are more specific, such as those that relate to particular individuals or situations, then the decision is administrative. The second test focuses on "the particularity of the

Clause, U.S. Const. art. I, § 6, cl. 1. See *Doe v. McMillan*, 412 U.S. 306, 324 (1973); *Harwood*, 69 F.3d at 629.

impact of the state of action." If the action involves establishment of a general policy, it is legislative; if the action "single[s] out specifiable individuals and affect[s] them differently from others," it is administrative.

*Cutting v. Muzzey*, 724 F.2d 259, 261 (1st Cir. 1984) (citations omitted).

When the relevant facts are uncontroverted and sufficiently developed, the question whether an act is "administrative" as opposed to "legislative" is a question of law, and it may be decided by the judge on a pretrial motion. See *Acevedo-Cordero*, 958 F.2d at 23. When the material facts are genuinely disputed, however, the question is properly treated as a question of fact, and its disposition must await the trial. See *id.*

In some ways, *Acevedo-Cordero* and this case are fair congeners. There, as here, the defendants asserted that budgetary woes sparked the enactment of a facially benign position-elimination ordinance. There, as here, the plaintiff(s) countered with a charge that, in fact, a constitutionally proscribed reason lurked beneath the surface. There, as here, conflicted evidence as to the defendants' true motives raised genuine issues of material fact. *Acevedo-Cordero* teaches that in such situations the issue of immunity must be reserved for the trial. See *id.*

Judge Saris faithfully applied these teachings, refusing to reward premature attempts by the individual defendants to dismiss the action on the basis of legislative immunity. At the end of the trial, the jury made two crucial findings. First, it found that the defendants' stated reason for enacting the position-elimination ordinance

was not their real reason. Second, it found that the plaintiff's constitutionally sheltered speech was a substantial or motivating factor in the actions which Roderick and Bogan took vis-à-vis the ordinance. These findings reflect the jury's belief that the individual defendants relied on facts relating to a particular individual – Scott-Harris – in the decisionmaking calculus and devised an ordinance that targeted Scott-Harris and treated her differently from other managers employed by the City.

We think that in passing on the individual defendants' post-trial motions, the judge in effect accepted these findings and concluded that the position-elimination ordinance (which, after all, constituted no more in this case than the means employed by Scott-Harris' antagonists to fire her) constituted an administrative rather than a legislative act. As long as the quantum of proof suffices – a matter to which we shall return – both this conclusion and its natural corollary (that Roderick and Bogan are not shielded from liability by operation of the doctrine of legislative immunity) rest on solid legal ground.<sup>14</sup> See, e.g., *Negron-Gaztambide v. Hernandez-Torres*, 35 F.3d 25, 27-28 (1st Cir. 1994), *cert. denied*, 115 S. Ct. 1098 (1995); *Vacca v. Barletta*, 933 F.2d 31, 33 (1st Cir.), *cert. denied*, 502 U.S. 866 (1991).

<sup>14</sup> The defendants do not assert a claim of qualified immunity, nor would such a claim be fruitful here. It was clearly established at the time of the plaintiff's ouster that public officials could not constitutionally punish a public employee for protected speech. See *Mt. Healthy*, 429 U.S. at 283-84.



### B. Causation.

Roderick has another string to her bow. She posits that, as a matter of law, her actions in respect to the position-elimination ordinance cannot be deemed the proximate cause of the harm to Scott-Harris.<sup>15</sup> She bases this claim on the fact that her vote alone was impuissant: five votes would ensure enactment of the ordinance, but six legislators voted for passage. Thus, not only was she unable to get the ordinance enacted by herself, but it also would have been passed without her cooperation. This thesis has a patina of plausibility, but it misstates the question before us (and, consequently, we take no view of it).

According to accepted lore, section 1983 actions are to be considered against the background of traditional tort principles. See *Monroe v. Pape*, 365 U.S. 167, 187 (1961); *Wagenmann v. Adams*, 829 F.2d 196, 212 (1st Cir. 1987). In tort law, determinations relating to causation are customarily "question[s] of fact for the jury, to be solved by the exercise of good common sense in the consideration of the evidence of each particular case." *Springer v.*

<sup>15</sup> Bogan does not press a comparable claim, probably because, as he concedes in his brief, the plaintiff's ouster required two distinct steps: (1) the mayor's proposal of the ordinance, and (2) a favorable vote by a majority of the city council. Although both events were necessary, Bogan's actions could properly be considered a proximate cause of the ultimate harm. See *Wagenmann v. Adams*, 829 F.2d 196, 212 (1st Cir. 1987) (upholding a jury finding that a police officer's characterization of plaintiff's conduct was a proximate cause of excessive bail, even though a judicial officer was responsible for the ultimate bail decision).

*Seaman*, 821 F.2d 871, 876 (1st Cir. 1987) (citations omitted). Phrased another way, "[a]pplication of the legal cause standard to the circumstances of a particular case is a function ordinarily performed by, and peculiarly within the competence of, the factfinder." *Swift v. United States*, 866 F.2d 507, 510 (1st Cir. 1989).

In this instance, the judge charged the jury as follows:

The defendant's actions are the legal cause of the plaintiff's injuries if [they were] a substantial factor in bringing about the harm. . . . It does not matter whether other concurrent causes contributed to the plaintiff's injuries so long as you find that the defendant's actions were a substantial factor in producing them. If defendant's actions were a substantial factor, then they were the legal cause or what we call the proximate cause.

Because no one objected to these instructions, they, whether or not entirely accurate, are the law of the case.<sup>16</sup> See *Moore v. Murphy*, 47 F.3d 8, 11 (1st Cir. 1995); *Milone v. Mocer Family, Inc.*, 847 F.2d 35, 38-39 (1st Cir. 1988).

We believe that the jury, applying this standard to the facts before it, could reasonably have concluded that Roderick's overall conduct was a substantial factor in

<sup>16</sup> We do not mean to suggest that the particular instructions given here are problematic. To the contrary, they appear at first blush to comport with precedent. See *Furtado v. Bishop*, 604 F.2d 80, 89 (1st Cir. 1979) (discussing causation in the context of section 1983), *cert. denied*, 444 U.S. 1035 (1980); see also *O'Brien v. Papa Gino's of Am., Inc.*, 780 F.2d 1067, 1072 (1st Cir. 1986).

depriving the plaintiff of her constitutional rights. After all, Roderick was not just another face in the crowd: she served as vice-president of the City Council and chaired its ordinance committee; as a result, the jury easily could find that she played a role in the passage of the ordinance that was disproportionate to her single vote. In order to gain approval, the ordinance had to go through the five-member ordinance committee. Roderick established this committee's agenda, and its favorable report on March 5 cleared the way for the ordinance's enactment.<sup>17</sup>

Although the plaintiff's evidence in this regard is not robust, it suffices in the context of the record as a whole to render the issue of causation susceptible to differing evaluative determinations. Thus, the district judge did not err in submitting the causation question to the jury. And because the jury reasonably could have adopted one such view of the evidence and concluded that Roderick made a successful effort to have the plaintiff ousted, the liability finding must stand.

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<sup>17</sup> The fact that other causes (i.e., the votes of fellow council members) concurrently contributed to the harm neither insulates Roderick's conduct nor undercuts the jury's verdict. See *Ricketts v. City of Columbia*, 36 F.3d 775, 779 (8th Cir. 1994), cert. denied, 115 S. Ct. 1838 (1995); *Wagenmann*, 829 F.2d at 211-13; see generally *Marshall v. Perez Arzuaga*, 828 F.2d 845, 848 (1st Cir. 1987) (stating that a "defendant is liable if his negligence is a proximate cause of the damage although it might not be the sole proximate cause of such damage") (emphasis in original; citations omitted), cert. denied, 484 U.S. 1065 (1988).

### C. Sufficiency of the Evidence.

Roderick and Bogan, in chorus, assert that insufficient evidence exists from which a jury lawfully could find that the desire to punish the plaintiff for her protected speech was a substantial or motivating factor behind the actions which they took. This assertion is easily refuted.

In challenging a jury verdict on sufficiency grounds, a defendant labors under a heavy burden. See *supra* note 9 (elucidating applicable legal standard and citing cases). Because the evidence in this case is capable of supporting two sets of divergent inferences, Roderick and Bogan cannot carry their burden.

We choose not to tarry. It suffices to say that, on this pleochroic record, the jury could have found that Biltcliffe used political connections to hinder the investigation of Scott-Harris' accusations by, *inter alia*, banishing the accuser, and that Roderick and Bogan were the instruments of her vengeance. Roderick bore an animosity toward Scott-Harris based on a history of friction between the two women, and the jury permissibly could have found that when Biltcliffe complained to her about Scott-Harris' charges, she spoke to Connors; that when Scott-Harris persisted, Roderick agreed to push the position-elimination ordinance despite the fact that Scott-Harris was performing her duties well; that the asserted budgetary basis for the ordinance was a sham;<sup>18</sup> and that Roderick knew as much.

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<sup>18</sup> On this point, the evidence permitted the jury to conclude that, rather than saving money, the position-elimination ordinance actually cost more because it necessitated



As to Bogan, much of the same evidence is relevant. In addition, the jury could have found that he knew Biltcliffe and resented Scott-Harris' outspoken efforts to cashier her; that he abetted the effort to save Biltcliffe's sinecure by terminating Scott-Harris (and no other manager) for a bogus reason; that he proposed the position-elimination ordinance to that end, notwithstanding Connors' opposition; that he happily signed it into law; that when he learned of Scott-Harris' intention to accept a different municipal position at a reduced salary, he pulled the rug from under her by increasing the responsibilities of the job and shifting her to a dingy office; that when Scott-Harris tried to retract her rejection of this diminished position, he foiled her efforts to do so; and that in all events Bogan showed his true colors by shortening Biltcliffe's suspension.

To be sure, this set of conclusions does not flow ineluctably from the evidence, but it represents a permissible construction of the record. Consequently, the evidence is adequate to support the verdicts against both Roderick and Bogan.

## VII. ATTORNEYS' FEES

Our journey is not yet ended. The last leg requires us to revisit the lower court's order awarding the plaintiff \$83,179.70 in counsel fees and associated expenses against three defendants (Roderick, Bogan, and the City), jointly and severally.

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the hiring of three new administrators to manage agencies that the plaintiff had been supervising single-handed.

In a section 1983 action a court, "in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988 (1994). Despite its seemingly precatory tone, we have interpreted this language to mean that "a prevailing plaintiff is presumptively entitled to fee-shifting" in a section 1983 case. *Casa Marie Hogar Geriatrico, Inc. v. Rivera-Santos*, 38 F.3d 615, 618 (1st Cir. 1994); accord *Foster v. Mydas Assocs., Inc.*, 943 F.2d 139, 145 (1st Cir. 1991) (stating that a prevailing civil rights plaintiff's entitlement to a fee award "comes almost as a matter of course"). For this purpose, a party prevails if she succeeds on a significant issue in the litigation and thereby achieves all or some meaningful part of the benefit that she envisioned when she brought suit. See *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983); *Pearson v. Fair*, 980 F.2d 37, 43 (1st Cir. 1992). The converse, of course, is equally true: if a plaintiff's claims against a particular defendant come to naught, she is not a prevailing party and is not entitled to reap a harvest under section 1988. See *Nunez-Soto v. Alvarado*, 956 F.2d 1, 3 (1st Cir. 1992). Moreover, if a plaintiff succeeds in the trial court but the judgment she obtains is reversed on appeal, she is no longer entitled to a fee award. See *Globe Newspaper Co. v. Beacon Hill Arch. Comm'n*, 100 F.3d 175, 195 (1st Cir. 1996).

Applying these standards to the case at bar, it is evident that the matter of attorneys' fees must be rethought. Because the plaintiff prevailed below on claims against all three defendants, none of them opposed her application for fees. In their appeals, however, they preserved the issue of whether (and to what extent) the fee award could withstand the reversal on

appeal of all or some part of the judgments. This precaution serves the City in good stead; because the judgment against it must be reversed, *see supra* Part V, the fee award against it must be nullified.

This leaves a nagging question as to the status of the award vis-a-vis Roderick and Bogan. On the one hand, the judgments against those two defendants remain intact, *see supra* Part VI, and, thus, as to them, the plaintiff remains a prevailing party presumptively entitled to reasonable attorneys' fees. On the other hand, the record before us is opaque as to the proper extent of that entitlement. This opacity is particularly pronounced because we do not know how much (if any) of the work performed by the plaintiff's lawyer in respect to Scott-Harris' unsuccessful claims against the City paved the way for her successful claims against the individual defendants. This is an important datum because a court may allow fees for time spent on unsuccessful claims only if those claims are sufficiently linked to successful claims. *See Lipsett v. Blanco*, 975 F.2d 934, 940-41 (1st Cir. 1992); *Aubin v. Fudala*, 782 F.2d 287, 290-92 (1st Cir. 1986).

We need go no further. From what we have said to this juncture, it is apparent that the matter of fees must be more fully explored – and it is preferable for obvious reasons that the trial court, as opposed to this court, undertake what amounts to an archeological dig into counsel's time sheets and make the necessary factual determinations. We therefore vacate the fee award against the City and remand so that the district court can reconsider the amount of fees and costs that should properly be assessed against the remaining defendants.

The plaintiff also has prevailed on appeal against two of the defendants, and she is entitled to a reasonable counsel fee for the work that yielded this victory. Though we often entertain such fee applications directly, we have sometimes opted to have the district court handle them. *See, e.g., Rodi v. Ventetuolo*, 941 F.2d 22, 31 (1st Cir. 1991); *see also* 1st Cir. Loc. R. 39.2 (permitting use of this alternative). Because the district court must in any event reopen its inquiry into the overall question of fees, we deem it expedient for the plaintiff to file her application for fees on appeal with that court, and for that court to make the supplementary award. We leave to Judge Saris the procedure to be followed on remand in respect to both reexamination of the original award and initial consideration of the supplementary award for services rendered and expenses (apart from ordinary costs) incurred on appeal.

*The plaintiff's cross-appeal (No. 95-2100) is denied and the district court's order permitting the reopening of the appeal period is affirmed. The judgment against the City of Fall River is reversed, and the fee award against it is vacated. The judgments against the remaining defendants are affirmed and the case is remanded to the district court for further proceedings in respect to both the previous fee award against these defendants and the question of fees on appeal. No costs are awarded in Nos. 95-1950 and 95-2100; costs are awarded to the plaintiff in Nos. 95-1951 and 95-1952.*

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## APPENDIX C

App. 75

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

JANET SCOTT-HARRIS,

Plaintiff,

CIVIL ACTION  
NO. 91-12057-PBS

v.

CITY OF FALL RIVER,  
DANIEL E. BOGAN,  
and MARILYN RODERICK,

Defendants.

ORDER OF JUDGMENT

SARIS, D.J.

June 3, 1994

This action came before the Court for a trial by jury. The issues have been tried, and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED:

JUDGMENT for the plaintiff, Janet Scott-Harris, on Count Two of the complaint. Compensatory damages are awarded in the amount of One Hundred Fifty-Six Thousand Dollars (\$156,000.00). Punitive damages are awarded against defendant Marilyn Roderick in the amount of Fifteen Thousand Dollars (\$15,000.00) and against defendant Daniel E. Bogan in the amount of Sixty Thousand Dollars (\$60,000.00).

By the Court,

/s/ Deborah C. Whitley  
Deputy Clerk

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APPENDIX D

UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

---

Nos. 95-1950  
95-1951  
95-1952

JANET SCOTT-HARRIS,  
Plaintiff, Appellee,

v.

CITY OF FALL RIVER, ET AL.,  
Defendants, Appellants.

---

Before

Selya and Boudin, *Circuit Judges*.\*

---

ORDER OF THE COURT

Entered: February 24, 1997

Marilyn Roderick and Daniel Bogan have petitioned for panel rehearing. Their joint petition centers on an instruction contained in the verdict form submitted by the trial judge to the jury at the close of all the evidence

---

\*Judge Aldrich participated in these appeals through and including the issuance of the panel opinion. When new counsel filed the instant petition for rehearing, however, Judge Aldrich removed himself from further consideration of the appeals and has had no role in respect to the petition for rehearing. The remaining two panelists have therefore reviewed the petition for rehearing and issue this order pursuant to 28 U.S.C. § 46(d).



(a copy of which, as completed by the jury, is annexed hereto). The form indicated that the jury should consider certain facts pertinent to the liability of the defendants Roderick (questions 5-7) and Bogan (Questions 8-10) only if it first found a set of facts indicating that their codefendant, the City of Fall River, was liable (questions 1-4).<sup>1</sup> The jury found all the defendants liable. The defendants appealed. In an opinion issued on January 15, 1997, the panel overruled the appeals of Ms. Roderick and Mr. Bogan, but sustained the City's appeal and reversed the verdict against it.

The petitioners now urge that, given the entry of judgment in the City's favor, the instruction on the verdict form requires a similar result as to them. We reject this argument. The law of the case doctrine, on which the petitioners rely, is not a straitjacket but a flexible rule; it will not be applied where to do so would promote injustice. *See Northeast Utils. Serv. Co. v. FERC*, 55 F.3d 686, 688-89 (1st Cir. 1995); *Moore v. Murphy*, 47 F.3d 8, 11 (1st Cir. 1995). This is such a instance.

We adopt this viewpoint for four principal reasons. First, despite being afforded an opportunity for supplemental briefing in connection with their rehearing petition, the petitioners have been unable to articulate any sound legal reason justifying the instruction. For our part, we can think of none; our case law has never demanded a finding against a municipality as a necessary prelude to individual liability for municipal officials. Second, the

<sup>1</sup> The district court also made certain other comments during the trial indicative of this same view.

jury's specific findings, as evidenced by the attached verdict form, clearly demonstrate a solid basis for liability on the part of Ms. Roderick and Mr. Bogan, entirely apart from any consideration of municipal liability. These findings are amply supported by the record. *See* Panel Op. at 32-36. Moreover, they reflect the trial judge's clear direction that the jury had to make separate and distinct liability determinations anent each of the three defendants. Third, the petitioners did not rely upon the verdict form instruction in any discernible way on appeal.

Fourth – and foremost – the petitioners have not shown that any unfair prejudice will result from our disregarding the instruction contained in the verdict form, taking the jury's specific findings at face value, and affirming the judgments on that basis. Indeed, if any prejudice existed from the erroneous inclusion of the newly highlighted instruction in the verdict form, it was prejudice to the plaintiff. Since she successfully proved her case against Roderick and Bogan, reversing the individual judgments would exalt form over substance and work a manifest injustice. We decline to command such a result.

The petition for rehearing is *denied*.

By Order:

/s/ WILLIAM H. NG  
Clerk

[cc: Messrs. Fulton, Schwartz, Assad, Marchand and Shirley]

(2)  
No. 96-1569

Supreme Court, U.S.

FILED

MAY 5 1997

CLERK

In The  
Supreme Court of the United States  
October Term, 1996

—◆—  
DANIEL BOGAN AND MARILYN RODERICK,  
*Petitioners,*  
v.

JANET SCOTT-HARRIS,  
*Respondent.*

—◆—  
Petition For Writ Of Certiorari  
To The United States Court Of Appeals  
For The First Circuit

—◆—  
OPPOSITION TO PETITION FOR CERTIORARI

—◆—  
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## TABLE OF CONTENTS

	Page
Statement of the Facts .....	1
Reasons for Denying the Writ .....	10
I. The First Circuit's approach to absolute legislative immunity is consistent with the opinions of this court and other federal appellate courts in that a determination of the legislative or non-legislative character of the act must first be made before immunity can shield a municipal official from suit.....	10
A. Neither the opinions of this Court nor other federal appellate courts, including the First Circuit Court of Appeals, permit a municipal officer to be shielded by absolute legislative immunity where the function in which the actor is engaged is not a legitimate legislative function .....	10
B. Disputed facts material to a determination of legislative immunity must be submitted to a jury, as in the present case .....	15
II. The First Circuit's decision regarding causation involves a question of fact wholly within the province of the fact finder and does not raise an issue of substantial importance regarding liability of legislators pursuant to 42 U.S.C. §1983 .....	21
Conclusion .....	23

## TABLE OF AUTHORITIES

## Page

## CASES

<i>Acevedo-Cordero v. Cordero-Santiago</i> , 958 F.2d 20 (1st Cir. 1992) .....	10, 11, 13, 15, 16
<i>Alexander v. Holden</i> , 66 F.3d 62 (4th Cir. 1995) ..	12, 13, 14
<i>Carver v. Foerster</i> , 102 F.3d 96 (3rd Cir. 1996) .....	19
<i>Christian v. Cecil County Maryland</i> , 817 F. Supp. 1279 (D. Md. 1993) .....	14
<i>Cinevision Corp. v. City of Burbank</i> , 745 F.2d 560 (9th Cir. 1984), <i>cert. denied</i> , 471 U.S. 1054 (1985) ....	12
<i>Crymes v. Dekalb County, Georgia</i> , 923 F.2d 1482 (11th Cir. 1991) .....	14
<i>Cutting v. Muzzey</i> , 724 F.2d 259 (1st Cir. 1984) .....	12, 13, 15, 16, 17
<i>Edwards v. Aguillard</i> , 482 U.S. 578 (1987) .....	20
<i>Forrester v. White</i> , 484 U.S. 219 (1988) ....	10, 11, 14, 17, 20
<i>Gross v. Winter</i> , 876 F.2d 165 (D.C. Cir. 1989) .....	14
<i>Haskell v. Washington Township</i> , 864 F.2d 1278 (6th Cir. 1988) .....	13
<i>Hughes v. Tarrant County, Tex.</i> , 948 F.2d 918 (5th Cir. 1991) .....	12, 13
<i>Hunter v. Underwood</i> , 471 U.S. 222 (1985) .....	20
<i>Milone v. Moceri Family, Inc.</i> , 847 F.2d 35 (1st Cir. 1988) .....	21
<i>Moore v. Murphy</i> , 47 F.3d 8 (1st Cir. 1995) .....	21
<i>Moore v. Trippe</i> , 743 F. Supp. 201 (S.D.N.Y. 1993) .....	14

## TABLE OF AUTHORITIES - Continued

## Page

<i>Negron-Gaztambide v. Hernandez-Torres</i> , 35 F.3d 25 (1st Cir. 1994), <i>cert denied</i> , 115 S.Ct. 1098 (1995) ....	13
<i>O'Brien v. City of Greers Ferry</i> , 873 F.2d 1115 (8th Cir. 1989) .....	12
<i>Rateree v. Rockett</i> , 852 F.2d 946 (7th Cir. 1988) ....	11, 14
<i>Reitz v. Persing</i> , 831 F. Supp. 410 (M.D. Md. 1993) ....	15
<i>Roberson v. Mullins</i> , 29 F.3d 132 (4th Cir. 1994) ...	13, 15
<i>Rogers v. Lodge</i> , 458 U.S. 613 (1982) .....	20
<i>Ryan v. Burlington County, NJ</i> , 889 F.2d 1286 (3rd Cir. 1989) .....	12
<i>Smith v. Lomax</i> , 43 F.3d 402 (11th Cir. 1995) .....	14
<i>South Carolina Educ. Ass'n v. Campbell</i> , 883 F.2d 1251 (4th Cir. 1989) .....	20
<i>Springer v. Seamen</i> , 821 F.2d 871 (1st Cir. 1987) .....	22
<i>Tenney v. Brandhove</i> , 341 U.S. 367 (1951) .....	11
<i>United States v. O'Brien</i> , 391 U.S. 367 (1968) .....	20
<i>Vacca v. Barletta</i> , 933 F.2d 31 (1st Cir. 1991), <i>cert. denied</i> , 502 U.S. 866 (1991) .....	13, 15

## STATUTES

42 U.S.C. §1983 .....	11, 21, 22
Sup.Ct. R. 10 .....	22



### STATEMENT OF THE FACTS

Janet Scott-Harris was the first African-American to work for the city of Fall River, Massachusetts in an administrative position, the first African-American directing white persons. She was the only African-American working in Fall River City Hall.

Ms. Scott-Harris worked in a high level position in Fall River, reporting directly to the city administrator and the mayor. She supervised four departments: the Department of Health, the Department of Veterans Affairs, the Building and Code Enforcement Division, and the Council on Aging. Ms. Scott-Harris excelled in her job. The defendants agreed she performed her job excellently. No defendant had any complaints about Ms. Scott-Harris' performance. No defendant had any complaints about the benefits to the city from the reorganization that created Ms. Scott-Harris' position. The position worked out well and she worked well in the position.

Despite her excellent performance Ms. Scott-Harris' position was eliminated as of March 29, 1991. All of the defendants in this case - Mayor Daniel Bogan, City Council Vice President Marilyn Roderick, and the City of Fall River - took the position that Ms. Scott-Harris' job was eliminated only for fiscal reasons. Ms. Scott-Harris alleged in her complaint, and the jury found, that her position was eliminated in retaliation for her exercise of her First Amendment rights to complain about racism at City Hall and specifically in retaliation for her efforts to have a politically well connected racist city employee, Dorothy Biltcliffe, fired.

### Dorothy Biltcliffe

Dorothy Biltcliffe was a long-time employee of Fall River. She knew the defendants Marilyn Roderick and Daniel Bogan for decades. She was politically active and well connected. She boasted of her contacts on the "sixth floor" of City Hall, where the mayor's office was located.

Ms. Scott-Harris was Ms. Biltcliffe's direct superior. They did not get along well. Ms. Biltcliffe simply refused to follow Ms. Scott-Harris' directions. Other employees complained that Ms. Biltcliffe yelled at them and threatened them, often making racial remarks. Speaking to other city employees, she referred to Ms. Scott-Harris as the "black nigger bitch" and to another nutrition program employee as a "little black bitch." She made frequent references to her friends in the mayor's office and often threatened to go to the "sixth floor" and talk to her "friends" there about her complaints. Ms. Biltcliffe's conduct came to a head in mid-October 1990 when at a meeting she flew into a rage and told the assistant director of the nutrition program that she was a "bitch with her head stuck up [Ms. Scott-Harris'] ass." She said she was not going to take this treatment and would "go to the sixth floor and get anything [she] wanted."

Ms. Scott-Harris contacted assistant Corporation Counsel Paul Desmarais and asked for help preparing charges against Ms. Biltcliffe. Desmarais told Ms. Scott-Harris that he wouldn't "touch a case with Dorothy Biltcliffe, she has been around a long time and she was really tough." No city attorney was appointed and Ms. Scott-Harris was forced to draw up the charges against Ms. Biltcliffe by herself.

Before Dorothy Biltcliffe, no Fall River city employee had ever been disciplined for making racial comments or for racist behavior.

Ms. Scott-Harris gave the charges to Ms. Biltcliffe. Ms. Biltcliffe responded by calling Ms. Scott-Harris "nothing but a black nigger bitch" and said Ms. Scott-Harris would not get away with this and that she "knew people" and she knew things and that Ms. Scott-Harris was "going to be sorry." The city eventually appointed an outside special assistant corporation counsel to present the charges. This man was eighty years old, blind and hard of hearing.

Ms. Biltcliffe went on medical leave for hypertension immediately after being informed of the charges against her. Her physician, who recommended the medical leave, was the chairman of the city's Board of Health. The hearing on the charges against Ms. Biltcliffe was scheduled for November 5, 1990. At her request the city continued that hearing to November 27 then to December 12 and then to February 28, 1991.

### Ms. Scott-Harris' position is eliminated

By the date of the hearing, Ms. Scott-Harris' situation at City Hall had changed dramatically. Shortly after the charges were lodged against Ms. Biltcliffe, Ms. Scott-Harris was called to the City Manager's office. He told her he had received a telephone call from the defendant City Council Vice President Marilyn Roderick questioning Ms. Scott-Harris' use of a city automobile. He ordered Ms. Scott-Harris to "just park it," which she interpreted as meaning she should not use the car. The day before



that meeting Ms. Scott-Harris had received a telephone call from State Senator Thomas Norton asking her to come to his office. When she went to Sen. Norton's office he told her Dorothy Biltcliffe had been calling him demanding that he intervene on her behalf. Sen. Norton then asked Ms. Scott-Harris whether she could do anything to resolve the Dorothy Biltcliffe matter. Sen. Norton asked Ms. Scott-Harris to speak with City Manager Robert Connors, saying "Bob will do what I tell him to do."

In December, Ms. Scott-Harris began hearing rumors that her position "was going to take a political hit." Then on February 12, 1991, Connors told Ms. Scott-Harris that her position was being eliminated.

Mayor Bogan had several options in regard to removing Ms. Scott-Harris from the city payroll. He could have acted on his own under authority under the Massachusetts General Laws and simply removed Ms. Scott-Harris from her position. He could have left the position vacant but unfunded, as he had done for the positions of directors of Public Health, Veterans Affairs and the Council on Aging for more than a year. Lastly, he could have recommended to the City Council that the Department of Health and Human Services be eliminated. All three options would have had the same financial impact on the city. He chose the third option.

Even though Ms. Scott-Harris was told by the city manager on February 12, 1991 that her position had been eliminated and even though Mayor Bogan wrote to the city clerk on March 18, 1991 informing the clerk that Ms. Scott-Harris' position was eliminated effective March 29,

the city council had not yet acted on his recommendation. The city council ordinance committee, chaired by Ms. Roderick, voted to approve elimination of Ms. Scott-Harris' position on March 21, 1991. The full city council met later in March and voted 6-2 to eliminate her position. The only effect of the ordinance passed by the City Council was to eliminate Ms. Scott-Harris' position. While these events were happening the Fall River newspaper had frequent articles about the events, with the articles normally on the top of the front page of the daily newspaper.

Ms. Scott-Harris' last day of employment with the city was March 29, 1991.

#### **Dorothy Biltcliffe returns to work**

On March 27 or 28 Attorney Roberts told Ms. Scott-Harris the city had settled its charges against Dorothy Biltcliffe. Ms. Biltcliffe would not have to admit to any wrongdoing and would accept a 60 day suspension, to begin the day after Ms. Scott-Harris left. Ms. Biltcliffe's suspension was due to end June 21, 1991. The city manager and the city's personnel director testified it was improper for the mayor to have any role in the discipline imposed on a city employee following a hearing. Nonetheless, Mayor Bogan ordered Ms. Biltcliffe to be reinstated June 3, rather than June 21.

#### **Marilyn Roderick**

The defendant Marilyn Roderick has been "in city government" in Fall River for 20 years. At the time of trial she had been on the city council for 18 years.

Councilwoman Roderick had a run-in with Ms. Scott-Harris early in Ms. Scott-Harris' tenure with the city. Ms. Scott-Harris took offense at comments Ms. Roderick made about black people and the two of them shouted at one another. Ms. Roderick "started to rake me over the coals about how I should be proud of my people," Ms. Scott-Harris said. In reply, Ms. Scott-Harris yelled at Ms. Roderick that her remarks were totally inappropriate and were racist. Ms. Scott-Harris portrayed the exchange as "a screaming, shouting, pointing match." After that confrontation their relationship was bitter and conflicting.

Ms. Roderick called Ms. Scott-Harris to testify at several public meetings. In those meetings Ms. Roderick spoke to Ms. Scott-Harris in a tone of voice that Ms. Scott-Harris described as "just ugly," a tone of voice she did not use in speaking to other city employee managers. Ms. Scott-Harris said appearing before Ms. Roderick in public was embarrassing and humiliating.

After the discrimination charges were brought against Ms. Biltcliffe, she contacted Ms. Roderick and said "she was having a problem with Janet Scott-Harris." Ms. Biltcliffe said she was having difficulty with an investigation going on and said she had been accused of "calling [Ms. Scott-Harris] names." Ms. Biltcliffe asked Councilwoman Roderick to look into the problem. Roderick knew the investigation involved racial allegations and she told Ms. Biltcliffe that Janet Scott-Harris had called her a racist, too. Roderick viewed the racism accusation against Ms. Biltcliffe as the same kind of accusation that had been made against her by Ms. Scott-Harris. She told Ms. Biltcliffe she would speak with the

City Manager about the investigation and she did speak with him.

Ms. Roderick learned that Ms. Biltcliffe had called at least one other city council member, Raymond Mitchell, about the charges Ms. Scott-Harris had brought against her. Besides herself and Councilor Mitchell, Ms. Roderick said that "very often constituents will speak to most of us." Councilwoman Roderick and Councilor Mitchell are "very close friends" and they discussed the problem Dorothy Biltcliffe was having with Ms. Scott-Harris. Another city councilor, John Medeiros, called Ms. Scott-Harris before the vote to eliminate her position and asked her why "they were trying to get rid of" her.

#### **The reasons why Ms. Scott-Harris was fired**

All three defendants – Marilyn Roderick, Daniel Bogan and the City of Fall River – offered a single explanation for why Ms. Scott-Harris was fired. The one and only reason for the elimination of her position was to save the city money. Her job performance had nothing to do with the decision to eliminate her position. In fact, they agreed her job performance had been excellent. The jury rejected the defendants' stated reason and specifically found, in response to a jury interrogatory, that the plaintiff had proven that the reason stated by the defendants for terminating Ms. Scott-Harris "was not the real reason" for their action.

For the last year or so prior to her termination the positions of the three department heads Ms. Scott-Harris was supposed to supervise – Veterans Affairs, Public Health and the Council on Aging – were all vacant. While



those positions were vacant Ms. Scott-Harris performed all of the day to day duties of each of those three positions. Mayor Bogan had no complaints about the way Ms. Scott-Harris was performing her job or the three jobs of Veterans Agent, Director of Public Health and Director of the Council on Aging.

Even though Ms. Scott-Harris had been performing the jobs of the directors of the Veterans Affairs Department, the Director of the Department of Public Health and the Director of the Council on Aging for more than a year with no problems, all three positions were funded in the fiscal year 1992 budget. The jury learned that the city saved \$46,305 by eliminating Ms. Scott-Harris' position. The jury also learned the city spent \$105,205 to fund the three vacant positions whose jobs Ms. Scott-Harris had been performing with no problems or complaints.

Additionally, the jury learned that at the same time Bogan proposed to eliminate Ms. Scott-Harris' position because he said he anticipated a ten percent reduction in state funding, Bogan was writing his fiscal year 1992 budget proposal. In Mayor Bogan's introduction to that 1992 budget Bogan said the budget was prepared assuming "\$62,802,604 from State Aid (Cherry Sheet)." The prior year's budget states it was prepared assuming "\$61,623,177 from State Aid (Cherry Sheet)." The jury thus could have concluded that rather than anticipating a decrease in state aid from fiscal year 1991 to 1992, Bogan prepared his budget assuming an increase in state aid.

On February 12, 1991 Ms. Scott-Harris was informed her employment with the city would terminate. She was

the only city administrator whose employment was terminated. Although some 135 positions – only 27 of which were currently filled by city employees – were eliminated later that fiscal year, none of those persons were notified of their termination until May 1991. The city's personnel director said Mayor Bogan asked her to prepare a "list of those folks that were going to be affected by the layoff in the fiscal '92 budget, what that included was by department, by position, by name of employee, their last day of work and how many hours [years] of service they had." She prepared that list. It did not contain Janet Scott-Harris' name. The list was prepared shortly before the employees were notified on May 15, 1991.

The only position added by the 1992 budget was the second administrative assistant in the Council on Aging, the position filled June 1, 1991 by Dorothy Biltcliffe.

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## REASONS FOR DENYING THE WRIT

### I. THE FIRST CIRCUIT'S APPROACH TO ABSOLUTE LEGISLATIVE IMMUNITY IS CONSISTENT WITH THE OPINIONS OF THIS COURT AND OTHER FEDERAL APPELLATE COURTS IN THAT A DETERMINATION OF THE LEGISLATIVE OR NON-LEGISLATIVE CHARACTER OF THE ACT MUST FIRST BE MADE BEFORE IMMUNITY CAN SHIELD A MUNICIPAL OFFICIAL FROM SUIT.

#### A. Neither the opinions of this Court nor other federal appellate courts, including the First Circuit Court of Appeals, permit a municipal officer to be shielded by absolute legislative immunity where the function in which the actor is engaged is not a legitimate legislative function.

Absolute immunity is a powerful legal doctrine. It provides a complete bar to personal liability for officials, regardless of culpability. *See, Acevedo-Cordero v. Cordero-Santiago*, 958 F.2d 20, 22 (1st Cir. 1992). The Supreme Court "has generally been quite sparing in its recognition of claims to absolute official immunity." *Forrester v. White*, 484 U.S. 219, 224 (1988). Officials seeking to be shielded by such immunity have the burden to show that the exemption is justified by overriding policy considerations. *Id.* The Court has also sought to avoid unnecessarily broadening the scope of absolute immunity by recognizing the doctrine of qualified immunity, which may provide a bar to liability where the official can show the contested actions were reasonable. *See, Forrester v. White*, 484 U.S. at 224; *Acevedo-Cordero v. Cordero-Santiago*, 958 F.2d at 22. On the one hand, the threat to government officials of liability for damages is meant to encourage the

exercise of official duties in a lawful and appropriate manner and to discourage conduct which may expose an official to liability. *See, Forrester v. White*, 484 U.S. at 223. At the same time, the Court has acknowledged that important policy considerations support the protection which immunity affords against personal liability for acts taken in the proper performance of an official's duties. *Id.* For example, a government official should not be inhibited from taking official action which may be unpopular or have adverse effects on certain people because of the threat of personal liability. *Id.* However, government officials are not entitled to absolute immunity for all actions they take. *See, e.g., Forrester v. White*, 484 U.S. at 224-225; *Acevedo-Cordero v. Cordero-Santiago*, 958 F.2d 20, 23 (1st Cir. 1992); *Rateree v. Rockett*, 852 F.2d 946, 950 (7th Cir. 1988).

Absolute immunity for the acts of officials is appropriate only under limited circumstances. The Court has articulated a "functional" approach to assist in making this determination. *Forrester v. White*, 484 U.S. at 224. Under this approach, there must be an inquiry beyond the title or position of an official into the nature of the functions which an official has been lawfully entrusted and the effect that exposure to liability would likely have on the exercise of those functions. *Id.* In the legislative context, the functional approach requires a determination of whether an act is "in the sphere of legitimate legislative activity" for which legislators are immune from 42 U.S.C. §1983 liability, *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951), or administrative, for which legislators may be entitled to qualified immunity but not absolute immunity.



The circuit courts have adopted slightly different standards to determine when absolute immunity should protect legislators from civil liability. As the Petitioners point out, the majority of the circuits, including the First Circuit, rely on common indicators such as "whether the action taken is traditionally legislative, involves the formulation of prospective, legislative-type policies rather than enforcement or application of existing policies, and whether the procedures followed in the action are those akin to proper legislative action." Petition p. 11. See, e.g., *Alexander v. Holden*, 66 F.3d 62, 66-67 (4th Cir. 1995) (adopting two-part test focusing on general or specific nature of underlying facts relied on in decision making process and general or specific nature of impact); *Hughes v. Tarrant County, Tex.*, 948 F.2d 918, 921 (5th Cir. 1991) (applying test of whether facts relied on were general, legislative facts related to broad policy or specific facts related to individual situation); *Ryan v. Burlington County, NJ*, 889 F.2d 1286, 1290 (3rd Cir. 1989) (actions must be both substantively and procedurally legislative); *O'Brien v. City of Greers Ferry*, 873 F.2d 1115, 1119 (8th Cir. 1989) (legislative act involves a formulation of policy governing future conduct of all or a class of the citizenry); *Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 580 (9th Cir. 1984), cert. denied, 471 U.S. 1054 (1985) (distinguishing between the formulation and the application of policy); *Cutting v. Muzzey*, 724 F.2d 259, 261 (1st Cir. 1984) (articulating two part test focusing on nature of underlying facts used to reach a decision and nature of impact of decision).

The two-part test adopted by the First Circuit focuses on the nature of the underlying facts on which the decision is based and on the particularity of the impact.<sup>1</sup> *Cutting v. Muzzey*, 724 F.2d at 261. If the decision is based on "legislative facts," that is, a generalization which concerns a "policy or state of affairs" and which impacts a general policy, it is legislative. *Id.* If, on the other hand, the decision is based on specific facts relating to individual people or situations that "single out specific individuals and affect them differently from others," it is administrative. *Cutting v. Muzzey*, 724 F.2d at 261 (citation omitted). The second test focuses on the particularity of the impact of the action. *Id.* *Cutting v. Muzzey* has been followed by the First Circuit in other cases. See, e.g., *Negron-Gaztambide v. Hernandez-Torres*, 35 F.3d 25, 28 (1st Cir. 1994), cert. denied, 115 S.Ct. 1098 (1995); *Vacca v. Barletta*, 933 F.2d 31, 33 (1st Cir. 1991), cert. denied, 502 U.S. 866 (1991); *Acevedo-Cordero v. Cordero-Santiago*, 958 F.2d 20. These decisions have been cited and followed by other federal courts. *Roberson v. Mullins*, 29 F.3d 132, 135 (4th Cir. 1994); *Alexander v. Holden*, 66 F.3d 62, 65 (4th Cir. 1995); *Hughes v. Tarrant County, Texas*, 948 F.2d 918, 920 (5th Cir. 1991); *Haskell v. Washington Township*, 864 F.2d

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<sup>1</sup> This Court has denied petitions for certiorari seeking review of the First Circuit's position on legislative immunity several times. See, *Vacca v. Barletta*, 933 F.2d 31, cert. denied, 502 U.S. 866 (1991) (Ejection of school committee member during debate on school budget was administrative, not legislative act) and *Negron-Gaztambide v. Hernandez-Torres*, 35 F.3d 25 (1st Cir. 1994), cert. denied, 115 S.Ct. 1098 (1995) (decision of legislative officials to discharge a legislative librarian from her position was an administrative decision and therefore was not protected by absolute legislative immunity).

1278 (6th Cir. 1988); *Crymes v. Dekalb County, Georgia*, 923 F.2d 1482, 1485 (11th Cir. 1991); *Moore v. Trippe*, 743 F. Supp. 201, 207 (S.D.N.Y. 1993); *Christian v. Cecil County Maryland*, 817 F. Supp. 1279, 1287 (D. Md. 1993), and see cases collected in *Smith v. Lomax*, 43 F.3d 402, 405-06 (11th Cir. 1995).

The Supreme Court and many federal courts recognize that under this "functional approach" absolute immunity does not apply to decisions concerning the hiring, firing or demotion of a person because such acts are administrative decisions, regardless of the title or position of the official. See, e.g., *Forrester v. White*, 484 U.S. at 229-30 (1988) (judge's firing of a probation officer was not within judicial immunity because it was an administrative act); *Gross v. Winter*, 876 F.2d 165, 170-73 (D.C. Cir. 1989) (council member who discharged legislative researcher, allegedly on account of her religion, acted in administrative capacity and not entitled to immunity); c.f. *Rateree v. Rockett*, 852 F.2d 946, 950 (7th Cir. 1988) (finding absolute immunity under the facts of that case involving elimination of position through passage of budget ordinance, but agreeing with plaintiffs "to the extent that employment decisions generally are administrative . . ."). Similarly, the fact that a legislative body accomplishes an action by vote does not by itself render the action a legislative one. *Alexander v. Holden*, 66 F.3d 62, 67 (4th Cir. 1995) (where the board of commissioners eliminated the salary of the position held by plaintiff, consolidated the position with another position, and refused to reappoint the plaintiff to the new position, the facts underlying the decision and the impact of the decision were specific, rendering it an administrative employment decision);

*Smith v. Lomax*, 45 F.3d 402, 405-06 (11th Cir. 1995) (vote by members of county board not to reappoint plaintiff as board clerk did not constitute broad, general policy making and therefore the members were not protected by legislative immunity); *Roberson v. Mullins*, 29 F.3d 132, 134-35 (4th Cir. 1994) (voting to terminate an employee does not involve the adoption of prospective legislative rules and therefore members of county board of supervisors who voted to terminate plaintiff as superintendent of public works were not entitled to legislative immunity); *Reitz v. Persing*, 831 F. Supp. 410 (M.D. Md. 1993) (chief of police, mayor and city council members acted in administrative capacity in decision to fire plaintiff parking ticket officer and therefore not entitled to absolute immunity).

**B. Disputed facts material to a determination of legislative immunity must be submitted to a jury, as in the present case.**

An act of a legislative body may be characterized as administrative as a matter of law where the relevant underlying facts are uncontroverted. See, *Cutting*, 724 F.2d at 261; *Vacca v. Barletta*, 933 F.2d at 33. When the underlying facts necessary to the decision are contested, however, those facts must be submitted to the jury to address two-part inquiry developed under *Cutting v. Muzzey*: (1) were the underlying facts on which the decision was based generalizations concerning policy or specific as they relate to individuals and (2) did the act have a general or particular impact. See, *Acevedo-Cordero v. Cordero-Santiago*, 958 F.2d at 23 (summary judgment was improper on issue of absolute immunity where there



was a factual dispute concerning whether the legislative body's decision to eliminate positions allegedly in violation of plaintiffs' right to free political association was a legitimate budget action entitled to immunity or a ruse to replace party supporters). This application of the functional approach is consistent with the thoughtful considerations and balancing of interests articulated by the opinions of this Court and of the federal courts as discussed above concerning the justifications for and the appropriate application of absolute immunity.

In this case, the issue of whether the position-elimination ordinance was a purely legislative budgetary matter or an administrative decision to specifically fire Ms. Scott-Harris properly went to the jury. *See, Scott-Harris v. City of Fall River, et al.*, slip op. at 30. When relevant facts under the *Cutting v. Muzzey* analysis are genuinely disputed, the question of whether an act is "administrative" as opposed to "legislative" is properly treated as a question of fact to be decided at trial. *Acevedo-Cordero*, 958 F.2d at 23. The questions submitted to the jury and the jury's ultimate findings concerning the liability of the individual defendants are consistent with the test articulated in *Cutting*.<sup>2</sup> In rejecting defendants' argument concerning absolute legislative immunity the

<sup>2</sup> Contrary to Petitioners' contention, the enactment of the Ordinance was not the only allegedly wrongful act at issue. Petition p. 16, n. 3. Evidence was offered by plaintiff concerning Mayor Bogan's conduct prior to and surrounding his recommendation of the ordinance and the jury was asked to decide on the recommendation. Similarly, evidence was offered concerning Roderick's chair of the ordinance committee which reported out the ordinance.

Court of Appeals held that the jury's findings "reflect the jury's belief that the individual defendants relied on facts relating to a particular individual - Scott-Harris - in the decision making calculus and devised an ordinance that targeted Scott-Harris and treated her differently from other managers employed by the City." *Scott-Harris v. City of Fall River, et al.*, slip op. at 31. None of the defendants objected to the jury instructions nor did they proffer an interrogatory to determine the applicability of the doctrine of absolute immunity. The Court of Appeals properly found that the position-elimination ordinance was, under the facts of this case, really no more than "the means employed by Scott-Harris' antagonists to fire her." *Id.*

Petitioners turn the First Circuit's inquiry into the motives of the defendants in order to determine whether they were acting in a legislative or administrative function on its head. Petitioners state that "in essence . . . the First Circuit held that the motives underlying the action, rather than the function of the action, i.e., legislative or administrative, was determinative of whether an individual legislator is entitled to . . . protections." Petition p. 20. Respondent suggests that the resolution of the issue of whether the individual actors were substantially motivated by fiscal considerations, as defendants argued to the trial court, or were acting to fire Scott-Harris in retaliation for her complaints about racial discrimination at City Hall, as the jury found, necessarily preceded a determination of whether the defendants' acts were legislative or administrative in accordance with the functional approach articulated by *Forrester v. White*, 484 U.S. 219, and explained by *Cutting v. Muzzey*, 724 F.2d 259.

Petitioners' statement of facts ignores or underdevelops crucial facts on which the jury arguably relied in determining that the individual defendants were motivated by considerations which would be determinative of the legislative or administrative function at issue. For example, the timing of events surrounding Scott-Harris' separation from employment raised material issues of fact regarding whether the position-elimination ordinance was part of the City Council's budget deliberations at all. Ms. Scott-Harris was told in February 1991 by Mayor Bogan that her job was being eliminated. Mayor Bogan wrote to the city clerk on March 18, 1991 notifying him that the position would be eliminated. The ordinance committee, headed by defendant Roderick, voted to recommend the position-elimination ordinance on March 21, 1991. All those actions took place before the City Council voted to eliminate Ms. Scott-Harris' position, creating an inference that Scott-Harris' removal was a done deal before it was even addressed by the City Council. In contrast to these actions concerning only Ms. Scott-Harris in February and March 1991, all other city employees who were affected by budget cuts voted on at other times by the City Council were notified in May 1991. The jury finding that Ms. Scott-Harris was not eliminated as part of the city's general budget cuts was supported by a list, prepared by the Personnel Department at Bogan's request, purportedly showing every employee affected by that fiscal year's budget cuts. Ms. Scott-Harris' name was not included on that list.

In addition, evidence concerning Bogan's decision to eliminate Scott-Harris' position supported the jury's rejection of Bogan's claim that his decision was based on

budget considerations. Bogan instructed Connors, the city administrator, to propose a list of lay-offs and proposals to cut costs. As a department head, Scott-Harris submitted a proposal for budget cuts in her department. Bogan rejected this proposal without even reading it and decided to fire her instead. Even when Connors opposed cutting Scott-Harris' position and even though Connors did not suggest eliminating her position, Bogan made the decision to terminate Scott-Harris anyway at precisely the time the hearings concerning her race discrimination allegations were scheduled. All these actions support the inference that Bogan's decision to fire Scott-Harris had nothing to do with saving money for the city, as the jury found.

Bogan did not need City Council approval to dismiss Ms. Scott-Harris. He could have dismissed her pursuant to his state statutory authority and allowed her position to remain vacant, just as he had done with the directors of public health, the council on aging and veteran affairs. Because he could have acted without City Council approval Bogan's actions were executive in nature and therefore not entitled to immunity. *See, Carver v. Foerster*, 102 F.3d 96, 100 (3rd Cir. 1996) (mayor who gave a unilateral order to have supporters of unsuccessful election candidate fired was engaging in either executive decision of how anticipated cutbacks should be implemented or an administrative decision that certain individuals should be fired).

The defendants should not be offered the opportunity to cloak what would otherwise be an undisputed administrative action under legislative immunity by opting to run the discharge through a city council vote in the



form of a position-elimination ordinance that had the singular effect of eliminating Scott-Harris' job. This is not a situation in which difficult legislative budget decisions resulted in job loss for one or several individuals, but instead was a situation where a jury found that individual defendants attempted to fire a specific city employee based on facts particular to that individual, rather than on policy considerations. In a situation such as this, where government officials punished one person for her exercise of her free speech rights and then voluntarily elected to confirm that decision by a city council vote, there should be no absolute shield from liability.<sup>3</sup> See, *supra*, discussion of *Forrester v. White*, 484 U.S. at 223. The opinions of this Court and of many federal courts support

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<sup>3</sup> The Court of Appeals found there was insufficient evidence of bad motives on the part of a majority of the City Council members and thus the city itself could not be found liable. Proof of the motivation of individual members of a legislative body is an almost impossible task. *Rogers v. Lodge*, 458 U.S. 613 (1982); *Hunter v. Underwood*, 471 U.S. 222, 228 (1985). Courts rarely attempt to determine the state of mind of individual members of a legislative body; even determining the collective intent of a legislature is a difficult enough task, "a perilous enterprise," and is ordinarily disfavored in constitutional law. See, e.g., *Edwards v. Aguillard*, 482 U.S. 578, 636-639 (1987) (Scalia, J., dissenting) ("discerning the subjective motivation of those enacting the statute is, to be honest, almost an impossible task"); *United States v. O'Brien*, 391 U.S. 367, 383 (1968); *South Carolina Educ. Ass'n v. Campbell*, 883 F.2d 1251, 1257-1262 (4th Cir. 1989).

As a result of the Court of Appeals' decision reversing the judgment against the city, allowing the individual defendants to escape liability, despite the jury finding that they fired Ms. Scott-Harris in retaliation for her complaints about racism, would leave her without a remedy.

the proposition that recourse for this type of wrongful act should be available through suit, and not simply through the ballot box, as petitioners suggest.

The opinion of the First Circuit does not alter the doctrine of absolute legislative immunity as articulated by relevant decision of this Court.

## II. THE FIRST CIRCUIT'S DECISION REGARDING CAUSATION INVOLVES A QUESTION OF FACT WHOLLY WITHIN THE PROVINCE OF THE FACT FINDER AND DOES NOT RAISE AN ISSUE OF SUBSTANTIAL IMPORTANCE REGARDING LIABILITY OF LEGISLATORS PURSUANT TO 42 U.S.C. §1983

The issue of causation was correctly left to the jury in questions 7 and 10, as follows:

Has Ms. Scott-Harris proven that the act of Councilwoman Marilyn Roderick in voting favorably toward the amendments was a proximate cause of the elimination of the position?

Do you find that the act of Mr. Bogan in recommending the amendment was the proximate cause of the elimination of the position?

No party objected to these instructions, and they became the law of the case. *Smith-Harris v. City of Fall River*, et al., slip op. at 33, citing, *Moore v. Murphy*, 47 F.3d 8, 11 (1st Cir. 1995); *Milone v. Moceri Family, Inc.*, 847 F.2d 35, 38-39 (1st Cir. 1988). Now petitioner claims that the decision of the Court of Appeals regarding this factual determination raises issues of substantial importance

regarding individual liability of legislators pursuant to 42 U.S.C. §1983.

If a fact finder concludes that the harm suffered by the plaintiff was a reasonably foreseeable result of an individual legislator's conduct, the legislator can be found liable. Individual defendants can be found liable for their acts, regardless of the liability of the municipal body. *See, e.g., Springer v. Seamen*, 821 F.2d 871 (1st Cir. 1987) (individuals who induced the Postal Service to take disciplinary action against an African-American contractor were subject to liability even though the postal service was freed from liability when there was no evidence that it was motivated by racial animus.)

The question of causation was a purely factual one. A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings. Sup.Ct. R. 10.

---

## CONCLUSION

For the reasons stated the Respondent Janet Scott-Harris requests that this Court deny the Petitioners' request for a petition for a writ of certiorari to review the judgment and opinion of the First Circuit Court of Appeals.

Respectfully submitted,

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AUG 14 1997

In The  
Supreme Court of the United States

October Term, 1996

DANIEL BOGAN AND MARILYN RODERICK,  
*Petitioners,*  
vs.

JANET SCOTT-HARRIS,  
*Respondent.*

On Writ Of Certiorari  
To The United States Court Of Appeals  
For The First Circuit

JOINT APPENDIX

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DRISCOLL, MARCHAND, BOYER  
& STANTON

PETITION FOR CERTIORARI FILED APRIL 4, 1997  
CERTIORARI GRANTED JUNE 9, 1997

291 PP

# TABLE OF CONTENTS

	Page
Docket Sheet, District Court .....	1
Plaintiff's Complaint.....	47
Answer of Defendants City of Fall River, Daniel Bogan, Robert L. Connors, Marilyn Roderick, John Alberto, John Mitchell, Leo Pelletier, and Michael Plasski .....	57
Voluntary Dismissal as to John Alberto, John Mitchell, Leo Pelletier, and Michael Plasski.....	66
Motion of Daniel Bogan to Dismiss .....	71
Motion of Marilyn Roderick to Dismiss .....	73
Memorandum in Support of Defendant, Marilyn Roderick's Motion to Dismiss.....	75
Motion of Defendant, City of Fall River for a Directed Verdict.....	127
Motion of Defendant, City of Fall River for a Directed Verdict Pursuant to Fed. R. Civ. P. 50(a) .....	129
Motion of Defendant, Marilyn Roderick and Robert L. Connors for a Directed Verdict Pursuant to Fed. R. Civ. P. 50(a) .....	133
Special Verdict Form .....	137
Original Verdict .....	142
Question from Jury, No. 5, 5/26/94.....	147
Judge Saris' Written Response to Question No. 5 from the Jury.....	148
Revised Special Verdict Form .....	149
Docketed Clerk Notes .....	154



## TABLE OF CONTENTS – Continued

	Page
Order of Judgment, 6/3/94.....	156
Motion of the Defendant, City of Fall River, for Judgment Notwithstanding the Verdict Pursuant to Fed. R. Civ. P. 50(b).....	157
Motion of the Defendant, Marilyn Roderick, for Judgment Notwithstanding the Verdict Pursuant to Fed. R. Civ. P. 50(b).....	159
Motion of the Defendant, Daniel Bogan, for Judgment Notwithstanding the Verdict Pursuant to Fed. R. Civ. P. 50(b).....	161
Memorandum and Order, August 11, 1995 .....	163
Judgment on Attorneys Fees.....	180
City of Fall River Notice of Appeal.....	182
Marilyn Roderick Notice of Appeal .....	183
Daniel Bogan Notice of Appeal .....	184
Janet Scott-Harris Notice of Appeal.....	185
Order of Court of Appeals 9/27/95.....	186
Order of Court of Appeals 6/18/96.....	188
Stenographic Transcript of Charge to the Jury.....	190
Question from the Jury .....	227
Question from the Jury .....	229
Stenographic Transcript of Jury Verdict .....	232
Stenographic Transcript of Hearing, September 29, 1994 .....	254
Order of the United States Supreme Court Granting Certiorari, 6/9/97 .....	287

## TABLE OF CONTENTS – Continued

The following opinions, decisions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:

Memorandum of Decision and Order of the United States District Court for the District of Massachusetts on Defendants' Motions for Judgment Notwithstanding the Verdict, dated January 27, 1995.....	App. 1
Judgment of the United States Court of Appeals for the First Circuit, dated January 15, 1997 .....	App. 34
Opinion of the United States Court of Appeals for the First Circuit, dated January 15, 1997 .....	App. 36
Order of Judgment of the United States District Court for the District of Massachusetts, dated June 3, 1994.....	App. 75
Order of the Court of the United States Court of appeals for the First Circuit, dated February 24, 1997 .....	App. 76

[NOTE: Bracketed italic material throughout indicates handwritten material in original.]

## APPEAL

U.S. District Court  
U.S. District Court - Massachusetts (Boston)  
CIVIL DOCKET FOR CASE #: 91-CV-12057

Scott-Harris v. Fall River, Filed: 08/05/91  
City of, et al Jury demand: Both  
Assigned to: Nature of Suit: 442  
Judge Patti B. Saris Jurisdiction: Federal Question  
Demand: \$0,000  
Lead Docket: None  
Dkt# in other court: None  
Cause: 42:1983 Civil Rights Act

JANET SCOTT-HARRIS  
Plaintiff

v.

Harvey A. Schwartz  
[COR LD NTC]  
Schwartz, Shaw & Griffith  
30 Federal Street  
4th Floor  
Boston, MA 02110  
617-338-7277

FALL RIVER, CITY OF  
Defendant

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[COR LD NTC]  
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Timothy E. Sterritt  
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[COR LD NTC]  
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617-451-3222



DANIEL E. BOGAN,  
individually and in his  
former official capacity  
as Mayor of the City of  
Fall River, Massachusetts  
Defendant

ROBERT L. CONNORS,  
individually and in his  
official capacity as City  
Administrator of the City  
of Fall River, Massachusetts  
Defendant

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Bruce A. Assad  
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508-673-2004

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[term 03/10/93]  
(See above)  
[COR LD NTC]

Timothy E. Sterritt  
[term 02/10/93]  
(See above)  
[COR LD NTC]

MARILYN RODERICK,  
individually and in her  
official capacity as a  
member of the Fall River  
City Council  
Defendant

JOHN ALBERTO,  
individually and in his  
official capacity as a  
member of the Fall River  
City Council  
Defendant

Stephen C. Fulton  
(See above)  
[COR LD NTC]

Bruce A. Assad  
(See above)  
[COR LD NTC]

Bernadette L. Sabra  
[term 03/10/93]  
(See above)  
[COR LD NTC]

Timothy E. Sterritt  
[term 02/10/93]  
(See above)  
[COR LD NTC]

Stephen C. Fulton  
(See above)  
[COR LD NTC]

Bruce A. Assad  
(See above)  
[COR LD NTC]

Bernadette L. Sabra  
[term 03/10/93]  
(See above)  
[COR LD NTC]

Timothy E. Sterritt  
[term 02/10/93]  
(See above)  
[COR LD NTC]

Stephen C. Fulton  
(See above)  
[COR LD NTC]

**JOHN MITCHELL,**  
individually and in his  
official capacity as a  
member of the Fall River  
City Council  
Defendant

Bernadette L. Sabra  
[term 03/10/93]  
(See above)  
[COR LD NTC]

Timothy E. Sterritt  
[term 02/10/93]  
(See above)  
[COR LD NTC]

Stephen C. Fulton  
(See above)  
[COR LD NTC]

**LEO PELLITIER,**  
individually and in his  
official capacity as a  
member of the Fall River  
City Council  
Defendant

Bruce A. Assad  
(See above)  
[COR LD NTC]

Timothy E. Sterritt  
[term 02/10/93]  
(See above)  
[COR LD NTC]

Stephen C. Fulton  
(See above)  
[COR LD NTC]

**MICHAEL PLASSKI,**  
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member of the Fall River  
City Council  
Defendant

Bruce A. Assad  
(See above)  
[COR LD NTC]

Bernadette L. Sabra  
[term 03/10/93]  
(See above)  
[COR LD NTC]

Timothy E. Sterritt  
[term 02/10/93]  
(See above)  
[COR LD NTC]

Stephen C. Fulton  
(See above)  
[COR LD NTC]

Proceedings include all events.

1:91cv12057

Scott-Harris v. Fall River, City of, et al APPEAL

8/5/91	1	Complaint filed (bdb) [Entry date 08/07/91] [1:91cv12057]
8/5/91	-	Filing fee Paid. Receipt #: 11177 Amount: \$120.00. (bdb) [Entry date 08/07/91] [1:91cv12057]
8/5/91	-	Summons(es) issued for Fall River, City of, Daniel E. Bogan, Robert L. Connors, Marilyn Roderick, John Alberto, John Mitchell, Leo Pellitier, Michael Plasski (bdb) [Entry date 08/07/91] [1:91cv12057]
9/3/91	2	Acknowledgement of service as to John Mitchell 8/27/91 Answer due on 9/16/91 for John Mitchell (cmg) [Entry date 09/06/91] [1:91cv12057]
9/3/91	3	Acknowledgement of service as to Fall River, City of 8/9/91 Answer due on 8/29/91 for Fall River, City of (cmg) [Entry date 09/06/91] [1:91CV12057]
9/3/91	4	Acknowledgement of service as to John Alberto 8/9/91 Answer due on 8/29/91 for John Alberto (cmg) [Entry date 09/06/91] [1:91cv12057]
9/3/91	5	Acknowledgement of service as to Michael Plasski 8/9/91 Answer due on 8/29/91 for Michael Plasski (cmg) [Entry date 09/06/91] [1:91cv12057]
9/3/91	6	Acknowledgement of service as to Robert L. Connors 8/9/91 Answer due



- on 8/29/91 for Robert L. Connors (cmg) [Entry date 09/06/91] [1:91cv12057]
- 9/3/91 7 Acknowledgement of service as to Marilyn Roderick 8/9/91 Answer due on 8/29/91 for Marilyn Roderick (cmg) [Entry date 09/06/91] [1:91cv12057]
- 9/3/91 8 Acknowledgement of service as to Leo Pellitier 8/13/91 Answer due on 9/2/91 for Leo Pellitier (cmg) [Entry date 09/06/91] [1:91cv12057]
- 9/3/91 9 STIPULATION by Janet Scott-Harris, Fall River, City of, Daniel E. Bogan, Robert L. Connors, Marilyn Roderick, John Alberto, John Mitchell, Leo Pellitier, Michael Plasski, extending time, reset answer due for 9/3/91 for Michael Plasski, for Leo Pellitier, for John Mitchell, for John Alberto, for Marilyn Roderick, for Robert L. Connors, for Daniel E. Bogan, for Fall River, City of, FILED. (cmg) [Entry date 09/06/91] [1:91cv12057]
- 9/3/91 10 Answer to Complaint by Fall River, City of, Daniel E. Bogan, Robert L. Connors, Marilyn Roderick, John Alberto, John Mitchell, Leo Pellitier, Michael Plasski; Jury demand (cmg) [Entry date 09/06/91] [1:91cv12057]
- 9/10/91 11 Judge Douglas P. Woodlock. Civil Order of Reference: Case referred to Magistrate Marianne B. Bowler for Rule 16b proceedings. (cmg) [1:91cv12057]
- 9/26/91 - Magistrate Marianne B. Bowler. Endorsed Order mooting [9-1] stipulation extending time, mooting [9-2] relief

- reset answer due for 9/3/91 for Michael Plasski, for Leo Pellitier, for John Mitchell, for John Alberto, for Marilyn Roderick, for Robert L. Connors, for Daniel E. Bogan, for Fall River, City of, mooting [9-3] relief (cmg) [Entry date 10/07/91] [1:91cv12057]
- 11/25/91 12 Notice of Hearing: set scheduling conference for 10:45 12/5/91 before Magistrate Marianne B. Bowler (cmg) [Entry date 11/26/91] [1:91cv12057]
- 12/5/91 14 Magistrate Marianne B. Bowler. Scheduling Order setting Status conference on 3:00 6/8/92 Discovery cutoff 6/5/92 (cmg) [Entry date 12/13/91] [1:91cv12057]
- 12/6/91 13 Notice of attorney appearance for Fall River, City of, Daniel E. Bogan, Robert L. Connors, Marilyn Roderick, John Alberto, John Mitchell, Leo Pellitier, Michael Plasski by Timothy E. Sterritt (cmg) [Entry date 12/10/91] [1:91cv12057]
- 2/5/92 15 Motion by Janet Scott-Harris to compel Discovery and/or for Other Relief to Magistrate/Judge Marianne B. Bowler (cmg) [Entry date 02/07/92] [1:91cv12057]
- 3/11/92 - Magistrate/Judge Marianne B. Bowler. Endorsed Order granting [15-1] motion to compel Discovery and/or for Other Relief, FILED. (c/s) (heb) [Entry date 03/13/92] [1:91cv12057]
- 3/17/92 16 Magistrate/Judge Marianne B. Bowler. Order: court hereby RESCINDS the

- Endorsed Order of 3/11/92; court  
- ALLOWS motion to compel inasmuch  
as motion is unopposed; costs are  
DENIED upon further showing of sup-  
port for such costs; ISSUED. (cc/cl)  
(heb) [Entry date 03/19/92]  
[1:91cv12057]
- 3/23/92 17 Memorandum by Janet Scott-Harris in  
support of [15-1] motion to compel Dis-  
covery and/or for Other Relief; FILED.  
(c/s) (heb) [1:91cv12057]
- 3/25/92 18 Motion by Fall River, City of, Daniel E.  
Bogan, Robert L. Connors, Marilyn  
Roderick, John Alberto, John Mitchell,  
Leo Pellitier, Michael Plasski to strike  
parts of [17-1] support memorandum;  
FILED. (c/s) (heb) [1:91cv12057]
- 3/25/92 19 Response by Fall River, City of, Daniel  
E. Bogan, Robert L. Connors, Marilyn  
Roderick, John Alberto, John Mitchell,  
Leo Pellitier, Michael Plasski in opposi-  
tion to [17-1] support memorandum;  
FILED. (c/s) (heb) [1:91cv12057]
- 3/25/92 20 Affidavit of John J. Finn Re: [19-1] oppo-  
sition response; FILED. (c/s) (heb)  
[1:91cv12057]
- 4/7/92 - Discovery conference held (heb) [Entry  
date 04/08/92] [1:91cv12057]
- 4/7/92 21 Magistrate/Judge Marianne B. Bowler.  
Clerk's Notes: Discovery conference  
held, reset discovery due for 10/30/92,  
reset final discovery conference for  
10:00 10/30/92 before Magistrate/Judge  
Marianne B. Bowler; dft to supply  
plaintiff with everything he has

- requested by 4/30/92; FILED. (c/s)  
(heb) [Entry date 04/08/92]  
[1:91cv12057]
- 4/7/92 - Magistrate/Judge Marianne B. Bowler.  
Endorsed Order mootng [18-1] motion  
to strike parts of [17-1] support mem-  
orandum; ISSUED. (cc/cl) (heb) [Entry  
date 04/08/92] [1:91cv12057]
- 4/7/92 - Magistrate/Judge Marianne B. Bowler.  
Endorsed Order granting in part, deny-  
ing in part [15-1] motion to compel Dis-  
covery and/or for Other Relief:  
ALLOWED to the extent that the dfts  
are ordered to produce the documents  
sought by 4/30/92; sanctions DENIED,  
there having been a showing that coun-  
sel's neglect was reasonable due to a  
period of disability; ISSUED. (cc/cl)  
(heb) [Entry date 04/08/92]  
[1:91cv12057]
- 4/14/92 22 Notice of Hearing: set final discovery  
conference for 10:30  
6/17/92 before Magistrate/Judge Mar-  
ianne B. Bowler; ISSUED. (cc/cl) (heb)  
[Edit date 04/14/92] [1:91cv12057]
- 10/30/92 23 Mag/Judge Marianne B. Bowler Order;  
Counsel having informed the court that  
the discovery is complete with the  
exception of four depositions and some  
written discovery that is currently  
scheduled for completion on November  
30, 1992, the file is hereby returned to  
the district judge for rescheduling a  
final pretrial conference. . . . FILED, c.s.  
(jmr) [Entry date 11/03/92]  
[1:91cv12057]



- 11/30/92 - CASE NO LONGER REFERRED TO Mag. Judge Marianne B. Bowler. (tmc) [Entry date 05/24/95] [1:91cv12057]
- 12/10/92 24 Judge Douglas P. Woodlock. Order, set pretrial conference for 2:30 2/22/93 This case will be assigned for trial in April 1993. FILED (cc.cl) (jmr) [Entry date 12/11/92] [1:91cv12057]
- 1/19/93 25 Notice of attorney appearance for Daniel E. Bogan by Robert J. Marchand FILED c.s. (jmr) [1:91cv12057]
- 2/10/93 26 Notice of attorney appearance for Michael Plasski, Leo Pellitier, John Mitchell, John Alberto, Marilyn Roderick, Robert L. Connors, Daniel E. Bogan, Fall River, City of by Stephen C. Fulton FILED c.s. (jmr) [1:91cv12057]
- 2/10/93 27 NOTICE OF WITHDRAWAL of attorney Timothy E. Sterritt for Fall River, City of, attorney Timothy E. Sterritt for Daniel E. Bogan, attorney Timothy E. Sterritt for Robert L. Connors, attorney Timothy E. Sterritt for Marilyn Roderick, attorney Timothy E. Sterritt for John Alberto, attorney Timothy E. Sterritt for John Mitchell, attorney Timothy E. Sterritt for Leo Pellitier, attorney Timothy E. Sterritt for Michael Plasski FILED c.s. (jmr) [1:91cv12057]
- 2/17/93 28 Notice of attorney appearance for Michael Plasski, Leo Pellitier, John Alberto, Marilyn Roderick, Robert L. Connors by Bruce A. Assad FILED c.s. (jmr) [1:91cv12057]

- 2/17/93 29 Pretrial memorandum by Michael Plasski, Leo Pellitier, John Mitchell, John Alberto, Marilyn Roderick, Daniel E. Bogan, Fall River, City of FILED c.s. (jmr) [1:91cv12057]
- 3/10/93 30 NOTICE OF WITHDRAWAL of attorney Bernadette L. Sabra for Fall River, City of, attorney Bernadette L. Sabra for Daniel E. Bogan, attorney Bernadette L. Sabra for Robert L. Connors, attorney Bernadette L. Sabra for Marilyn Roderick, attorney Bernadette L. Sabra for John Alberto, attorney Bernadette L. Sabra for John Mitchell, attorney Bernadette L. Sabra for Michael Plasski, FILED. (c/s) (mas) [Entry date 03/12/93] [1:91cv12057]
- 3/12/93 - Pre-trial conference held (tmm) [Entry date 03/18/93] [1:91cv12057]
- 3/12/93 31 Judge Douglas P. Woodlock. Clerk's Notes: Pretrial Conference. Parties ready for trial as scheduled before the visiting judges. (tmm) [Entry date 03/18/93] [1:91cv12057]
- 3/12/93 32 Supplemental Pretrial memorandum by Janet Scott-Harris (tmm) [Entry date 03/18/93] [1:91cv12057]
- 4/8/93 36 Judge James M. Burns. Clerk's Notes: Counsel appear before visiting Judge Burns for pre-trial conference. Parties [sic] have discussed settlement but not able to settle at this time. Case is ready for trial, but attorney Fulton has vacation plans beginning April 16, 1993. Case may be impanneled on Monday April

- 12, 1993. Court will be in touch with counsel regarding trial date. FILED (jmr) [Entry date 04/26/93] [Edit date 06/15/94] [1:91cv12057]
- 4/8/93 37 Trial briefs by Janet Scott-Harris. FILED c.s. (jmr) [Entry date 04/26/93] [1:91cv12057]
- 4/12/93 33 Motion by Daniel E. Bogan to continue trial to 4/20/93, FILED. (c/s)(mas) [Entry date 04/13/93] [1:91cv12057]
- 4/12/93 34 Plaintiff's request for Jury Instructions, FILED. (mas) [Entry date 04/13/93] [1:91cv12057]
- 4/12/93 35 Motion of Stephen C. Fulton, atty. for dft., City of Fall River, to continue assigned trial date, FILED. (mas) [Entry date 04/13/93] [1:91cv12057]
- 4/12/93 38 Judge James M. Burns. Clerk's Notes: Counsel appear for jury empanelment before visiting Judge Burns. Attorney Marchand requests continuance of a trial and his client Mayor of Fall River has gone on a cruise and will not return until April 17 or 18, 1993. Court directs attorney Marchand to try to reach his client by ship to shore radio, but attorney Marchand advises the court he does not know the name of the ship his client is traveling on. Court then orders attorney Marchand to try and reach the children of his client to get information of the name of the ship. Attorney Marchand after a short recess advises the court he cannot reach his client's children. Court then holds a lengthy (3

- hour) "Settlement Conference" with all parties. Michael Fried insurance adjusts, participates by phone in settlement negotiations. Defendants are having a problem as a [sic] to the wording of a document whereby a release would be issued to the public regarding plaintiffs [sic] discrimination by the city counsel. Parties are also far apart as to the monetary amount of the settlement. Court will hold a further settlement conference in a few days. The trial is continued at this time. FILED (jmr) [Entry date 04/26/93] [1:91cv12057]
- 4/12/93 - Judge James M. Burns. Endorsed Order granting [35-1] motion to continue assigned trial date; After lengthy [sic] hearing, the within motion is allowed. FILED (cc.cl) (jmr) [Entry date 04/26/93] [1:91cv12057]
- 4/16/93 39 Judge James M. Burns. Clerk's Notes: Further settlement conference held by visiting Judge Burns. Attorneys Assad Marchant [sic] and Fried participated by telephone. The defendants are reluctant to settle and case is placed back on "Civil Master Trial List" as of May 10, 1993. FILED (jmr) [Entry date 04/26/93] [1:91cv12057]
- 7/6/93 40 Judge Samuel P. King. Clerk's Notes: Counsel appear before visiting Judge Samuel P. King for assignment for trial. Counsel advise there are no pending motions and that case is ready for trial. Trial will be jury, 4-5 days. Plaintiff Jane [sic] Scott-Harris may have a scheduling



- problem due to a job assignment, but trial is presently scheduled for Monday, 7/19/93. If Ms. Scott-Harris cannot be available, the case will come off the calendar and go back on "Master Trial List" for next available visiting Judge; set Jury trial for 9:00 on 7/19/93 before Judge Samuel P. King, FILED. (mas) [Entry date 07/08/93] [1:91cv12057]
- 10/4/93 41 Ltr. to Clerk from Harvey A. Schwartz requesting case be put back on Judge Woodlock's trial calendar, FILED. (c/s) (cmg) [Entry date 10/14/93] [1:91cv12057]
- 1/24/94 - Case reassigned from Judge Woodlock to Judge Patti B. Saris, upon appointment to the bench. Notice (1/18/94) sent to counsel. (cmg) [1:91cv12057]
- 2/7/94 42 Judge Patti B. Saris. Clerk's Notes: Pre-trial Conference held. Jury Trial (7-10 days) set for 5/9/94; 9:00, Final Pretrial Conference set for 4/27/94, at 2:00 pm all counsel to appear on [sic] person. Settlement potential negative. ISSUED PTO #33 t/b/terminated as moot. (mcm) [Entry date 02/10/94] [1:91cv12057]
- 2/10/94 43 Judge Patti B. Saris. Pretrial/Trial Pre-trial Conference set for 2:00 4/27/94, cc/cl. (mcm) [1:91cv12057]
- 2/10/94 - Judge Patti B. Saris. Endorsed Order mooting [33-1] motion to continue trial to 4/20/93 (mcm) [1:91cv12057]
- 5/4/94 44 Judge Patti B. Saris. Clerk's Notes: re: FINAL PRETRIAL CONFERENCE Court Reporter: none. JURY TRIAL date

- adjusted to 05/16/94; parties anticipate 7 trial days. Parties' pretrial findings rec'd in Court. Pltf's rsp to SJ (mtn f. in Court today) shall be f/s by 05/13/94. Motion t/b/ruled on at directed verdict stage. (dlw) [Entry date 05/12/94] [1:91cv12057]
- 5/4/94 45 Proposed voir dire questions by Fall River, City of, filed. (dlw) [Entry date 05/12/94] [1:91cv12057]
- 5/4/94 46 Motion by Fall River, City of to dismiss so much of pltf's complaint as refers to Daniel Bogan, John Connors, or Marilyn Roderick "in official capacity", filed. (dlw) [Entry date 05/12/94] [1:91cv12057]
- 5/4/94 47 Proposed verdict form received from Fall River, City of. (dlw) [Entry date 05/12/94] [1:91cv12057]
- 5/4/94 48 Witness list by Fall River, City of, filed. (dlw) [Entry date 05/12/94] [1:91cv12057]
- 5/4/94 49 Exhibit list by Fall River, City of, filed. (dlw) [Entry date 05/12/94] [1:91cv12057]
- 5/4/94 50 Motion by Marilyn Roderick, Robert L. Connors, Daniel E. Bogan, Fall River, City of to dismiss Count IV of the pltf's complaint (c. 93 s. 102 claim), filed. (dlw) [Entry date 05/12/94] [1:91cv12057]
- 5/4/94 51 Memorandum by Marilyn Roderick, Robert L. Connors, Daniel E. Bogan, Fall River, City of in support of [50-1] motion

- to dismiss Count IV of the pltf's complaint (c. 93 s. 102 claim), filed. (dlw) [Entry date 05/12/94] [1:91cv12057]
- 5/4/94 52 Motion by Marilyn Roderick, Robert L. Connors, Daniel E. Bogan, Fall River, City of in limine for order excluding testimony of therapist Brenda Bachman as to medical treatment and prohibiting reference thereto before the jury, filed. (dlw) [Entry date 05/12/94] [1:91cv12057]
- 5/4/94 53 Proposed Jury instructions by Marilyn Roderick, Robert L. Connors, Daniel E. Bogan, Fall River, City of, filed. (dlw) [Entry date 05/12/94] [1:91cv12057]
- 5/4/94 54 Motion by Robert L. Connors to dismiss as to this dft for failure to state a claim, filed. (dlw) [Entry date 05/12/94] [1:91cv12057]
- 5/4/94 55 Memorandum by Robert L. Connors in support of [54-1] motion to dismiss as to this dft for failure to state a claim, filed. (dlw) [Entry date 05/12/94] [1:91cv12057]
- 5/4/94 56 Motion by Marilyn Roderick to dismiss as to this dft for failure to state a claim, filed. (dlw) [Entry date 05/12/94] [1:91cv12057]
- 5/4/94 57 Memorandum by Marilyn Roderick in support of [56-1] motion to dismiss as to this dft for failure to state a claim, filed. (dlw) [Entry date 05/12/94] [1:91cv12057]

- 5/4/94 58 Motion by Daniel E. Bogan to dismiss as to this dft for failure to state a claim, filed. (dlw) [Entry date 05/12/94] [1:91cv12057]
- 5/4/94 59 Memorandum by Daniel E. Bogan in support of [58-1] motion to dismiss as to this dft for failure to state a claim, filed. (dlw) [Entry date 05/12/94] [1:91cv12057]
- 5/4/94 60 Witness list by Janet Scott-Harris, filed. (dlw) [Entry date 5/12/94] [1:91cv12057]
- 5/4/94 61 Proposed voir dire questions by Janet Scott-Harris, filed (dlw) [Entry date 05/12/94] [1:91cv12057]
- 5/4/94 62 Proposed Jury instructions by Janet Scott-Harris, filed. (dlw) [Entry date 05/12/94] [1:91cv12057]
- 5/4/94 63 Proposed verdict form received from Janet Scott-Harris. (dlw) [Entry date of 05/12/94] [1:91cv12057]
- 5/4/94 64 Proposed Joint Exhibit list by Janet Scott-Harris, filed. (dlw) [Entry date of 05/12/94] [1:91cv12057]
- 5/4/94 78 Motion by Fall River, City of for directed verdict, filed. (tmc) [Entry date 05/12/94] [1:91cv12057]
- 5/11/94 70 Letter by Harvey A. Schwartz dated: 5/10/94 to: Ms. Whitney re: has a conflict with Court for a brief period on the morning of 5/19/94, filed. (tmc) [Entry date 05/12/94] [1:91cv12057]
- 5/13/94 65 Memorandum by Janet Scott-Harris in opposition to [50-1] motion to dismiss



- Count IV of the pltf's complaint (c. 93 s. 102 claim), filed. (dlw) [Entry date of 05/12/94] [1:91cv12057]
- 5/13/94 71 Memorandum by Janet Scott-Harris in opposition to [58-1] motion to dismiss as to this dft for failure to state a claim, filed. (dlw) [Entry date of 05/12/94] [1:91cv12057]
- 5/16/94 66 Motion by Janet Scott-Harris to amend complaint, filed. (dlw) [1:91cv12057]
- 5/16/94 67 Motion by Fall River, City of for directed verdict presented at the close of the pltf's opening statement, filed. (dlw) [1:91cv12057]
- 5/16/94 68 Motion by Marilyn Roderick, Robert L. Connors for directed verdict for a directed verdict (presented at close of pltf's opening stmt., filed. (dlw) [1:91cv12057]
- 5/16/94 69 Memorandum by Janet Scott-Harris in opposition to [54-1] motion to dismiss as to this dft for failure to state a claim, filed. (dlw) [1:91cv12057]
- 5/16/94 - Jury trial held. (tmc) [Entry date 5/27/94] [1:91cv12057]
- 5/16/94 76 Judge Patti B. Saris. Clerk's Notes: re: JURY TRIAL DAY ONE (empanelment). Lobby conference held off record. Plaintiff's motion to amend complaint (m. rsp to dfts raising issue of qualified immunity) filed in court. Counsel were advised that dfts. m/d on this issue would not be addressed this late, nor

- will plaintiff's motion to amend be considered. Deft's m/d in official capacity to be granted. 8 jurors to be seated; 8 peremptories per side . . . (defts. to pool their 8 challenges). Voir dire conducted. Panel of 8 jurors seated; sworn. General Instructions given . . . Opening Statements . . . witness #1, #2 . . . Adjourned until 9:00 am 5/17/94. Court Reporter: CLOONAN (tmc) [Entry date 05/27/94] [1:91cv12057]
- 5/16/94 - Judge Patti B. Saris. Endorsed Order entered granting without opposition [46-1] motion to dismiss so much of pltf's complaint as refers to Daniel Bogan, John Connors, or Marilyn Roderick "in official capacity". cc/cl (tmc) [Entry date 05/27/94] [Edit date 06/14/94] [1:91cv12057]
- 5/16/94 - Judge Patti B. Saris. Endorsed Order entered granting without opposition [50-1] motion to dismiss Count IV of the pltf's complaint (c. 93 s. 102 claim). cc/cl (tmc) [Entry date 05/27/94] [1:91cv12057]
- 5/16/94 - Judge Patti B. Saris. Endorsed Order entered granting in part [52-1] motion in limine for order excluding testimony of therapist Brenda Bachman as to medical treatment and prohibiting reference thereto before the jury. However, the Court permits plaintiff to say she saw a Therapist. cc/cl (tmc) [Entry date 05/27/94] [1:91cv12057]
- 5/16/94 - Judge Patti B. Saris. Endorsed Order entered denying as untimely [54-1]

- motion to dismiss as to this dft for failure to state a claim. cc/cl (tmc) [Entry date 05/27/94] [1:91cv12057]
- 5/16/94 - Judge Patti B. Saris. Endorsed Order entered denying as untimely [56-1] motion to dismiss as to this dft for failure to state a claim. cc/cl (tmc) [Entry date 05/27/94] [1:91cv12057]
- 5/16/94 - Judge Patti B. Saris. Endorsed Order entered denying as untimely [58-1] motion to dismiss as to this dft for failure to state a claim. cc/cl (tmc) [Entry date 05/27/94] [1:91cv12057]
- 5/16/94 - Judge Patti B. Saris. Endorsed Order entered denying as untimely [66-1] motion to amend complaint. Also, it is unfairly prejudicial to defendant's to raise a conspiracy claim on the morning of trial after three years of litigation. cc/cl (tmc) [Entry date 05/27/94] [1:91cv12057]
- 5/16/94 - Judge Patti B. Saris. Endorsed Order entered denying [67-1] motion for directed verdict presented at the close of the pltf's opening statement. cc/cl (tmc) [Entry date 05/27/94] [1:91cv12057]
- 5/16/94 - Judge Patti B. Saris. Endorsed Order entered granting in part with respect to Mr. Connors for the reasons stated in Court, denying in part with respect to Ms. Roderick [68-1] motion for directed verdict for a directed verdict (presented at close of pltf's opening stmt.) cc/cl(tmc) [Entry date 05/27/94] [1:91cv12057]

- 5/17/94 77 Judge Patti B. Saris. Clerk's Notes: re: JURY TRIAL DATE TWO HELD: 8 jurors \*\*SIDEBAR: re: motion issues; medical records; count 4 dismissed (state claims); witness #3 direct exam . . . ADJOURNED until 5/18/94 at 9:00 am Court Reporter: CLOONAN (tmc) [Entry date 05/27/94] [1:91cv12057]
- 5/17/94 83 Judge Patti B. Saris. Clerk's Notes: re: Jury Trial-Day Two-Note form Juror advising of inadvertent contact w/witness in elevator. Counsel advised. No action taken. Note filed. (attached to Clerks Notes) (scj) [Entry date 06/08/94] [1:91cv12057]
- 5/18/94 77 Judge Patti B. Saris. Clerk's Notes: re: JURY TRIAL DAY THREE HELD: 8 jurors . . . continuation of direct exam of wtn. #3 . . . ADJOURNED until 5/19/94 at 11:00 am. Court Reporter: CLOONAN (tmc) [Entry date 05/27/94] [1:91cv12057]
- 5/19/94 77 Judge Patti B. Saris. Clerk's Notes: re: JURY TRIAL DAY FOUR: 8 jurors, continued cross-exam of witness #3. ADJOURNED until 5/20/94 at 9:00 am. Court Reporter: CLOONAN (tmc) [Entry date 05/27/94] [1:91cv12057]
- 5/20/94 77 Judge Patti B. Saris. Clerk's Notes: re: JURY TRIAL DAY 5 HELD: witness #4: takes stand . . . EXCUSED . . . witness #5: takes stand. Court Reporter: CLOONAN (tmc) [Entry date 05/27/94] [1:91cv12057]



- 5/23/94 77 Judge Patti B. Saris. Clerk's Notes: re: JURY TRIAL DAY SIX HELD: witness #5 . . . witness #6 . . . take stand . . . Court Reporter: CLOONAN (tmc) [Entry date 05/27/94] [1:91cv12057]
- 5/24/94 77 Judge Patti B. Saris. Clerk's Notes: re: JURY TRIAL DAY SEVEN HELD: 8 jurors. witness #7: takes stand . . . witness EXCUSED . . . brief recess . . . jury excused until 11:00 am. motions to dismiss ans for directed verdict; hearing on record; ALLOWED on def. Robert Connors; DENIED on other 2 defts Bogan and Roderick). Witness #8 . . . takes stand . . . WITNESS EXCUSED. Defense rests; Plaintiff rests . . . Evidence closed. Court ADJOURNED UNTIL 9:00 am on 5/25/94. Court Reporter: CLOONAN (tmc) [Entry date 05/27/94] [Edit date 05/27/94] [1:91cv12057]
- 5/25/94 77 Judge Patti B. Saris. Clerk's Notes: re: JURY TRIAL DAY 8 HELD: 8 jurors (special verdict form distributed) . . . Closing arguments (Assad, Marchad, Fulton); Plaintiff's closing arguments (Schwartz) Brief recess; jury charge. Court Reporter: CLOONAN (tmc) [Entry date 05/27/94] [1:91cv12057]
- 5/25/94 84 Judge Patti B. Saris. Clerk's Notes: re: Jury Trial-Day Eight-Deliberations begin. Question One received at 12:00 p.m. Responses inscribed by Judge after consultation w/counsel, and question is returned to jury. Jury instructed not to dispose of question as it will be filed

- and made part of the record. Question Two received at 2:00 p.m. Responses enscribed by Judge after consultation with counsel, and question is returned to jury. Same instruction. Question Three received at 2:20 p.m. Response read in Court after consultation w/counsel. Reporter Marie Cloonan ADJOURNED until 9:00 a.m. 5/26/94 (scj) [Entry date 06/08/94] [1:91cv12057]
- 5/26/94 72 Transcript of proceedings for May 6, 1994, before Judge: Saris. Excerpt, First Day Of Trial. Court Reporter: Marie L. Cloonan, FILED. (cmg) [1:91cv12057]
- 5/26/94 73 Transcript of proceedings for May 8, 1994, before Judge: Saris. Cross-Examination by Mr. Assad of Janet L. Scott-Harris, Third Day. Court Reporter: Marie L. Cloonan, FILED. (cmg) [1:91cv12057]
- 5/26/94 74 Transcript of proceedings for May 19, 1994, before Judge: Saris. Fourth Day of Trial. Court Reporter: Marie L. Cloonan, FILED. (cmg) [1:91cv12057]
- 5/26/94 75 Transcript of proceedings for May 20, 1994, before Judge: Saris. Excerpt Fifth Day of Trial. Court Reporter: Marie L. Cloonan, FILED. (cmg) [1:91cv12057]
- 5/26/94 85 Judge Patti B. Saris . Clerk's Notes: re: Jury Trial-Day Nine-Deiliberations [sic] resume. Question 4 receieved [sic] at 10:30 a.m. Response enscribed by Judge after consultation with counsel. Question returned to jury with instructions not to dispose of it. 3:55 p.m. Verdict

reached. Reporter Marie Cloonan, Verdict form improperly filled out. (see ORIGINAL VERDICT FORM-3:55 p.m., 5/26/94 attached) Jury sent back to deliberate after curative instructions given. Question 5 received [sic] at 4:30 p.m. Response is encribed by the Judge after consultation w/counsel and returned to the jury. 5:20 p.m. Jury returns verdict. Jury finds for the plaintiff on Count II of complaint. Jury awards compensatory damages in the amount of \$156,000.00. Punitive damages awarded against defendant Roderick in the amount of \$15,000.00 and against defendant Bogan in the amount of \$60,000.00 Verdict recorded. REVISED VERDICT FORM FILED. Jury discharged. Sidebar w/counsel: Plaintiff's Motion w/supporting aff on attys fees due 6/3/94, responses due 6/10/94. Judgement will then be entered, w/post-trial motion t/b/f thereafter. Dfts orally renew motion for mistrial; DENIED (scj) [Entry date 06/08/94] [1:91cv12057]

- 6/2/94 79 Motion by Janet Scott-Harris for attorney fees, and for costs , with memorandum in support, FILED. (c/s) (cmg) [1:91cv12057]
- 6/3/94 80 Judge Patti B. Saris . Judgment entered for Janet Scott-Harris against Marilyn Roderick, Daniel E. Bogan . Principal: \$ 156,000.00 for compensatory damages, punitive damages against Marilyn Broderick in the amount of \$15,000.00 and against defendant Daniel E. Bogan on

- the amount of \$60,000.00 cc/cl (scj) [Entry date 06/06/94] [1:91cv12057]
- 6/3/94 81 Supplemental Motion by the attorney for Janet Scott-Harris for attorney fees , filed. (scj) [Entry date 06/08/94] [1:91cv12057]
- 6/3/94 82 Affidavit of Scott W. Lang, attorney for Janet Scott-Harris re: [81-1] motion for attorneys fees , filed. (scj) [Entry date 06/08/94] [1:91cv12057]
- 6/6/94 - Case closed. (scj) [Edit date 06/29/94] [1:91cv12057]
- 6/13/94 86 Motion by Fall River, City of for judgment notwithstanding the verdict based upon the facts set forth in the Defendant's motion for directed verdict filed during trial , filed. (scj) [Entry date 06/14/94] [1:91cv12057]
- 6/13/94 87 Memorandum by Fall River, City of in support of [86-1] motion for judgment notwithstanding the verdict based upon the facts set forth in the Defendant's motion for directed verdict filed during trial , filed. (scj) [Entry date 06/14/94] [1:91cv12057]
- 6/13/94 88 Certificate of service by Fall River, City of re: [86-1] motion for judgment notwithstanding the verdict based upon the facts set forth in the Defendant's motion for directed verdict filed during trial , filed. (scj) [Entry date 06/14/94] [1:91cv12057]
- 6/15/94 89 Memorandum by Janet Scott-Harris in opposition to [86-1] motion for judgment



- not withstanding the verdict based upon the facts set forth in the Defendant's motion for directed verdict filed during trial , filed. (scj) [Entry date 06/17/94] [1:91cv12057]
- 6/16/94 90 Motion by Marilyn Roderick for judgment not withstanding the verdict , filed. (scj) [Entry date 06/17/94] [1:91cv12057]
- 6/16/94 91 Memorandum by Marilyn Roderick in support of [90-1] motion for judgment not withstanding the verdict , filed. (scj) [Entry date 06/17/94] [1:91cv12057]
- 6/16/94 92 Motion by Daniel E. Bogan for judgment not withstanding the verdict , filed. (scj) [Entry date 06/17/94] [1:91cv12057]
- 6/16/94 93 Memorandum by Daniel E. Bogan in support of [92-1] motion for judgment not withstanding the verdict , filed. (scj) [Entry date 06/17/94] [1:91cv12057]
- 6/23/94 94 Memorandum by Janet Scott-Harris in opposition to [90-1] motion for judgment not withstanding the verdict filed by Marilyn Roderick and Daniel Bogan , filed. (scj) [Entry date 06/24/94] [1:91cv12057]
- 6/28/94 95 Mag. Judge Patti B. Saris . Notice of Hearing/conference: Motion hearing set for 3:00 7/27/94 for [92-1] motion for judgment not withstanding the verdict, set for 3:00 7/27/94 for [90-1] motion for judgment not withstanding the verdict, set for 3:00 7/27/94 for [86-1] motion for judgment not withstanding the verdict based upon the facts set forth in the

- Defendant's motion for directed verdict filed during trial . (scj) [Entry date 07/01/94] [1:91cv12057]
- 7/7/94 96 Letter by Harvey A. Schwartz dated: Junly [sic] 7, 1994 to: Deputy Clerk Whitney re: Second supplemental motion for attorneys fees and a request for the issue to be heard on July 27, 1994 whereas the defendant's motion for a judgement notwithstanding the verdict is to be heard at that time (scj) [1:91cv12057]
- 7/7/94 97 Second Supplemental Motion by Janet Scott-Harris for attorney fees, and for costs , filed. (scj) [1:91cv12057]
- 7/7/94 98 Affidavit of Harvey A. Schwartz , re: [97-1] motion for attorney fees, [97-2] motion for costs , filed. (scj) [1:91cv12057]
- 7/21/94 99 Plaintiff's Supplemental Memorandum by Janet Scott-Harris in opposition to [92-1] motion for judgment not withstanding the verdict, [90-1] motion for judgment not withstanding the verdict , filed. (scj) [Entry date 07/25/94] [1:91cv12057]
- 9/29/94 - Motion hearing re: [86-1] motion for judgment not withstanding the verdict based upon the facts set forth in the Defendant's motion for directed verdict filed during trial Motion hearing held, [92-1] motion for judgment not withstanding the verdict Motion hearing held, [90-1] motion for judgment not withstanding the verdict Motion hearing

held, [79-1] motion for attorney fees, [81-1] motion for attorney fees, [97-1] motion for attorney fees (scj) [Entry date 10/07/94] [1:91cv12057]

9/29/94 100 Judge Patti B. Saris . Clerk's Notes: re: Motion Hearing [86-1] motion for judgment not withstanding the verdict based upon the facts set forth in the Defendant's motion for directed verdict filed during trial taken under advisement, [92-1] motion for judgment not withstanding the verdict taken under advisement, [90-1] motion for judgment not withstanding the verdict taken under advisement, granting [79-1] motion for attorney fees, granting without opposition [81-1] motion for attorney fees, granting without opposition [97-2] motion for costs granting without opposition. ORDERED: By 10/13/94 P's Supplemental Brief is due Court Reporter: Marie Cloonan (scj) [Entry date 10/07/94] [1:91cv12057]

9/29/94 - Judge Patti B. Saris . Endorsed Order entered granting [97-1] motion for attorney fees, granting [97-2] motion for costs, granting [81-1] motion for attorney fees, granting [79-1] motion for attorney fees without opposition. (scj) [Entry date 10/07/94] [1:91cv12057]

10/19/94 101 Supplemental Memorandum by Janet Scott-Harris in opposition to [92-1] motion for judgment not withstanding the verdict filed by Bogan, [90-1] motion for judgment not withstanding the verdict filed by Roderick, [86-1] motion for judgment not withstanding the verdict

based upon the facts set forth in the Defendant's motion for directed verdict filed during trial filed by the City of Fall River , filed. (scj) [Entry date 10/24/94] [1:91cv12057]

10/25/94 102 Letter by Harvey A. Schwartz dated: October 24, 1994 to: Deputy Clerk Whitney re: Status of Settlement Negotiations As defendant's insurer made an offer of \$5,000.00 to plaintiff's attorney it now seems very unlikely the case will be settled. Therefore [sic] parties are requesting that Judge Saris begin ruling on dispositive motions that remain pending. , filed. (scj) [Entry date 10/26/94] [1:91cv12057]

11/4/95 103 Letter by Harvey A. Schwartz dated: November 4, 1994 to: Deputy Clerk Whitney re: Two Massachusetts cases that raise the same issues as are raised in the Defendant's Motions for Judgment Not Withstanding the Verdict , filed. (scj) [Entry date 11/07/94] [1:91cv12057]

1/4/95 104 Transcript filed from the eighth day of trial-closing arguments of Mr. Schwartz (scj) [1:91cv12057]

1/6/95 105 Letter by Harvey A. Schwartz dated: Jan. 4, 1995 to: Deb Whitney re: Scalia dissent in EDWARDS v. AGUILLARD, 482 U.S. 578, 636-640 . . . re S.Ct.'s historical position "that determining the subjective intent of legislators is a [sic] perilous enterprise." Case enclosed. filed. (dlw) [1:91cv12057]



- 1/27/95 106 Judge Patti B. Saris . Memorandum and Order entered. denying [86-1] motion for judgment notwithstanding the verdict based upon the facts set forth in the Defendant's motion for directed verdict filed during trial, denying [90-1] motion for judgment notwithstanding the verdict, denying [92-1] motion for judgment notwithstanding the verdict (scj) [Entry date 01/30/95] [1:91cv12057]
- 1/30/95 - Judge Patti B. Saris, by the Court, by Deputy Clerk Whitney . Endorsed Order entered denying [86-1] motion for judgment notwithstanding the verdict based upon the facts set forth in the Defendant's motion for directed verdict filed during trial, denying [90-1] motion for judgment notwithstanding the verdict, denying [92-1] motion for judgment notwithstanding the verdict for the reasons stated in the Memorandum and Order dated 1/27/95. (scj) [1:91cv12057]
- 2/6/95 - Mail sent to Stephen C. Fulton returned by Post Office because: Forwarding address expired. (scj) [1:91cv12057]
- 2/6/95 - Attorney Fulton's new address is updated-Fulton, Racico & Longin-200 State Street-Boston, MA. 02109- (617) 439-4777 (scj) [1:91cv12057]
- 2/6/95 107 Attorney Update form is forwarded to Systems Adm for update to database re: Attorney Stephen C. Fulton (scj) [1:91cv12057]
- 4/1/95 119 Motion by Marilyn Roderick to vacate [80-1] judgment order entered on June 6,

1995. filed,c/s. (scj) [Entry date 04/11/95] [Edit date 05/10/95] [1:91cv12057]
- 4/6/95 108 Letter by Harvey A. Schwartz dated: April 6, 1995 to: Mr. Fried re: Demand for payment of judgment , filed. (scj) [1:91cv12057]
- 4/7/95 109 Letter by Stephen C. Fulton dated: April 7, 1995 to: Judge Saris re: Status of Motions for Attorneys Fees: At the time of the hearing on the Motions for Judgment Notwithstanding the Verdict, there was in fact no ruling on the Motions for Attorneys Fees. On February 2, 1995 Mr. Schwartz requested a ruling on the Motions for Attorneys Fees (a copy of letter to the Clerk is attached). Mr. Fulton further requests a ruling on the matter and also that a hearing be held on the matter. filed. (scj) [Entry date 04/11/95] [1:91cv12057]
- 4/11/95 110 Motion by Marilyn Roderick, Daniel E. Bogan, Fall River, City of for an order confirming that the plaintiff's motions for attorneys fees was to be treated as a motion to alter or amend the judgment should the defendant's motions for judgment notwithstanding the verdict be denied , filed, c/s. (scj) [Edit date 05/10/95] [1:91cv12057]
- 4/11/95 111 Motion by Marilyn Roderick, Daniel E. Bogan, Fall River, City of for entry of an order and/or an amended judgment pursuant to Fed. R.Civ. P. and for notice of that entry pursuant to Fed. R.Civ. P. 77 , filed. (scj) [1:91cv12057]

- 4/11/95 112 Motion by Marilyn Roderick, Daniel E. Bogan, Fall River, City of to vacate any final judgment [sic] and any order with respect to the plaintiff's motion for attorneys fees pursuant to Fed. R.Civ. P. 60 (b)(6) , filed. (scj) [1:91cv12057]
- 4/11/95 113 Motion by Marilyn Roderick, Daniel E. Bogan, Fall River, City of to reopen the time for appeal pursuant to Fed.R.App.P. 4(a)(6) , filed. (scj) [1:91cv12057]
- 4/11/95 114 Affidavit of Stephen C. Fulton , re: [112-1] motion to vacate any final judgment [sic] and any order with respect to the plaintiff's motion for attorneys fees pursuant to Fed. R.Civ. P. 60 (b)(6), [111-1] motion for entry of an order and/or an amended judgment pursuant to Fed. R.Civ. P. and for notice of that entry pursuant to Fed. R.Civ. P. 77, [110-1] motion for an order confirming that the plaintiff's motions for attorneys fees was to be treated as a motion to alter or amend the judgment should the defendants' motions for judgment notwithstanding the verdict be denied , filed. (scj) [1:91cv12057]
- 4/11/95 115 Memorandum in support of [113-1] motion to reopen the time for appeal pursuant to Fed.R.App.P. 4(a)(6) , filed. (scj) [1:91cv12057]
- 4/11/95 116 Motion by Daniel E. Bogan to vacate [80-1] judgment order entered June 6, 1994. filed, c/s. (scj) [1:91cv12057]

- 4/11/95 117 Motion by Daniel E. Bogan to reopen the time for appeal pursuant to Fed.R. App. 4(a)(6), filed. (scj) [1:91cv12057]
- 4/11/95 118 Affidavit of Robert J. Marchand , re: [117-1] motion to reopen the time for appeal pursuant to Fed.R. App. 4(a)(6), [116-1] motion to vacate [80-1] judgment order , filed. (scj) [1:91cv12057]
- 4/11/95 120 Motion by Marilyn Roderick to reopen the time for appeal pursuant to Fed. R. App. 4(a)(6) filed, c/s. (scj) [Edit date 05/10/95] [1:91cv12057]
- 4/11/95 121 Affidavit of Bruce A. Assad , re: [120-1] motion to reopen the time for appeal pursuant to Fed. R. App. 4(a)(6) , filed. (scj) [1:91cv12057]
- 4/13/95 122 Letter by Harvey A. Schwartz dated: April 13, 1995 to: Deputy Clerk Whitney re: Transcripts of J.N.O.V. Hearing which has been ordered by the Court and a copy is to be distributed to Mr. Schwartz. , filed. (scj) [Entry date 04/18/95] [1:91cv12057]
- 4/27/95 123 Letter by Harvey A. Schwartz dated: April 26, 1995 to: Deputy Clerk Whitney re: Request for the Court to clarify whether or not a copy of the transcript will be provided automatically to each attorney in the case. filed. (scj) [Entry date 05/04/95] [1:91cv12057]
- 5/9/95 124 Motion by Janet Scott-Harris for an Evidentiary Hearing filed, c/s. (scj) [Entry date 05/10/95] [1:91cv12057]



- 5/9/95 125 Response by Janet Scott-Harris in opposition to [120-1] motion to reopen the time for appeal [sic] pursuant to Fed. R. App. 4(a)(6), [117-1] motion to reopen the time for appeal [sic] pursuant to Fed.R. App. 4(a)(6), [116-1] motion to vacate [80-1] judgment order, [113-1] motion to reopen the time for appeal pursuant to Fed.R.App.P. 4(a)(6), [112-1] motion to vacate any final judgment [sic] and any order with respect to the plaintiff's motion for attorneys fees pursuant to Fed. R.Civ. P. 60 (b)(6), [111-1] motion for entry of an order and/or an amended judgment pursuant to Fed. R.Civ. P. and for notice of that entry pursuant to Fed. R.Civ. P. 77, [110-1] motion for an order confirming that the plaintiff's motions for attorneys fees was to be treated as a motion to alter or amend the judgment should the defendants' motions for judgment notwithstanding the verdict be denied, [119-1] motion to vacate [80-1] judgment order. filed, c/s attachement exhibits A-E. (scj) [Entry date 05/10/95] [1:91cv12057]
- 5/15/95 127 Judge Patti B. Saris . Notice of Hearing/conference: Motion hearing set for 11:00 6/2/95 for [124-1] motion for an Evidentiary Hearing, set for 11:00 6/2/95 for [120-1] motion to reopen the time for appeal [sic] pursuant to Fed. R. App. 4(a)(6), set for 11:00 6/2/95 for [117-1] motion to reopen the time for appeal [sic] pursuant to Fed.R. App. 4(a)(6), set for 11:00 6/2/95 for [116-1] motion to vacate [80-1] judgment order, set for

- 11:00 6/2/95 for [113-1] motion to reopen the time for appeal [sic] pursuant to Fed.R.App.P. 4(a)(6), set for 11:00 6/2/95 for [112-1] motion to vacate any final judgment [sic] and any order with respect to the plaintiff's motion for attorneys fees pursuant to Fed. R.Civ.P. 60 (b)(6), set for 11:00 6/2/95 for [111-1] motion for entry of an order and/or an amended judgment pursuant to Fed. R.Civ. P. and for notice of that entry pursuant to Fed. R.Civ.P.77, set for 11:00 6/2/95 for [110-1] motion for an order confirming that the plaintiff's motions for attorneys fees was to be treated as a motion to alter or amend the judgment should the defendant's motions for judgment notwithstanding the verdict be denied, set for 11:00 6/2/95 for [119-1] motion to vacate [80-1] judgment order . (scj) [Entry date 05/19/95] [1:91cv12057]
- 5/17/95 126 Letter by Harvey A. Schwartz dated: May 16, 1995 to: Deputy Clerk Whitney re: First Circuit Court of Appeals Opinion in the case of Virella-Nieves v. Briggs & Stratton Corp. filed. (scj) [Entry date 05/19/95] [1:91cv12057]
- 6/1/95 128 Third Supplemental Motion by Janet Scott-Harris in 1:91-cv-12057 for attorney fees and costs. filed, c/s. (scj) [1:91cv12057]
- 6/2/95 - Motion hearing re: [110-1] motion for an order confirming that the plaintiff's motions for attorneys fees was to be treated as a motion to alter or amend the

judgment should the defendant's motions for judgment notwithstanding the verdict be denied Motion hearing held, [111-1] motion for entry of an order and/or an amended judgment pursuant to Fed. R.Civ. P. and for notice of that entry pursuant to Fed. R.Civ.P. 77 Motion hearing held, [112-1] motion to vacate any final judgment [sic] and any order with respect to the plaintiff's motion for attorneys fees pursuant to Fed. R.Civ.P. 60 (b)(6) Motion hearing held, [113-1] motion to reopen the time for appeal pursuant to Fed.R.App.P. 4(a)(6) Motion hearing held, [116-1] motion to vacate [80-1] judgment order Motion hearing held, [117-1] motion to reopen the time for appeal pursuant to Fed.R. App. 4(a)(6) Motion hearing held, [119-1] motion to vacate [80-1] judgment order Motion hearing held (scj) [Entry date 06/17/95] [1:91cv12057]

- 6/2/95 129 Judge Patti B. Saris. Clerk's Notes: re: MOTION HEARING [110-1] on motions nos. 110, 111, 112, 113, 116, 117, 119 (motions to enlarge appeal period, etc.) Pltf has now filed a third supplemental motions [sic] for attys fees. After hearing ORDERED: 1. Upon receipt of any opposition to the third supplemental motion for attys fees, the Court will rule, and a separate judgment on attorneys fees shall enter. 2. During the next two weeks, counsel shall confer re settlement. Motion for an order confirming that the plaintiff's motions for attorneys fees was to be treated as a motion to

alter or amend the judgment should the defendant's motions for judgment notwithstanding the verdict be denied taken under advisement, [111-1] motion for entry of an order and/or an amended judgment pursuant to Fed. R.Civ. P. and for notice of that entry pursuant to Fed. R.Civ.P. 77 taken under advisement, [112-1] motion to vacate any final judgment [sic] and any order with respect to the plaintiff's motion for attorneys fees pursuant to Fed.R.Civ.P. 60 (b)(6) taken under advisement, [113-1] motion to reopen the time for appeal pursuant to Fed.R.App.P. 4(a)(6) taken under advisement, [116-1] motion to vacate [80-1] judgment order taken under advisement, [117-1] motion to reopen the time for appeal pursuant to Fed.R.App. 4(a)(6) taken under advisement, [119-1] motion to vacate [80-1] judgment order taken under advisement. Copies of this minute order mailed to counsel of record. Court Reporter: Marie Cloonan (scj) [Entry date 06/17/95] [1:91cv12057]

- 6/16/95 130 Response by Fall River, City of in 1:91-cv-12057 in opposition to [128-1] motion for attorney fees and costs, filed. (scj) [Entry date 06/17/95] [1:91cv12057]
- 6/21/95 131 Response by Marilyn Roderick in 1:91-cv-12057 in opposition to [128-1] motion for attorney fees and costs, filed. (scj) [1:91cv12057]
- 6/28/95 - Judge Patti B. Saris. Endorsed Order entered denying in part [128-1] motion



for attorney fees and costs. "I do not believe it is reasonable to compensate plaintiff's counsel for time spent in the Mass G.L. Ch. 93 A action against the insurer in state court. Plaintiff's counsel shall submit a proposed form of judgment consistent with the ruling. (endorsement on opposition filed in Court on June 23, 1995) (scj) [Entry date 07/10/95] [Edit date 09/13/95] [1:91cv12057]

- 7/12/95 - Proposed Order of Judgment by Michael Plasski in 1:91-cv-12057, Leo Pellitier in 1:91-cv-12057, John Mitchell in 1:91-cv-12057, John Alberto in 1:91-cv-12057, Marilyn Roderick in 1:91-cv-12057, Robert L. Connors in 1:91-cv-12057, Daniel E. Bogan in 1:91-cv-12057, Fall River, City of in 1:91-cv-12057, Janet Scott-Harris in 1:91-cv-12057 received for filing. (scj) [1:91cv12057]
- 7/28/95 132 Transcript of proceedings for held on proceeding date: 9/29/94 before Judge: Saris. Court Reporter: Cloonan (sad) [1:91cv12057]
- 8/2/95 133 Notice of change of address filed by Harvey A. Schwartz and Siobhan M. Sweeney in 1:91-cv-12057 of the firm of Schwartz, Shaw & Griffith. Attorney update forms forwarded to Systems Office (scj) [1:91cv12057]
- 8/11/95 134 Judge Patti B. Saris. Memorandum and Order entered. denying [110-1] motion for an order confirming that the plaintiff's motions for attorneys fees was to be treated as a motion to alter or amend

the judgment should the defendant's motions for judgment notwithstanding the verdict be denied denying [111-1] motion for entry of an order and/or an amended judgment pursuant to Fed. R.Civ. P. and for notice of that entry pursuant to Fed. R.Civ.P.77 denying [112-1] motion to vacate any final judgment [sic] and any order with respect to the plaintiff's motion for attorneys fees pursuant to Fed. R.Civ.P. 60 (b)(6) granting [113-1] motion to reopen the time for appeal pursuant to Fed.R.App.P. 4(a)(6) denying [116-1] motion to vacate [80-1] judgment order granting [117-1] motion to reopen the time for appeal pursuant to Fed.R. App. 4(a)(6) denying [119-1] motion to vacate [80-1] judgment order granting [120-1] motion to reopen the time for appeal pursuant to Fed. R. App. 4(a)(6) mooted [124-1] motion for an Evidentiary Hearing: FOR THE FOREGOING REASONS, THE COURT ALLOWS DEFENDANTS' MOTIONS TO REOPEN THE TIME FOR APPEAL PURSUANT TO FED. R. APP. P. 4(a)(6). . . . THE COURT DENIES THE DEFENDANTS' MOTIONS (1) TO CONFIRM THAT PLTF'S MOTIONS FOR ATTORNEYS FEES WERE T/B/TREATED AS A MOTION TO ALTER OR AMEND; (2) TO VACATE ANY FINAL JUDGMENT AND ORDER WITH RESPECT TO PLTF'S MOTION FOR ATTORNEYS FEES PURSUANT TO FED. R. CIV. P. 60(b)(6) AND REENTER THE SAME; AND (3) TO ENTER AN

AMENDED JUDGMENT PRUSUANT [sic] TO FED. R. CIV. P. 58 AND PROVIDE NOTICE OF THAT ENTRY PURSUANT TO FED. R. CIV. P. 77. This order was entered on the docket on 08/14/95 (dw), f. cc/cl (dlw) [Entry date 08/14/95] [1:91cv12057]

- 8/14/95 135 ORDER OF JUDGMENT ON ATTORNEYS FEES entered: Pursuant to Fed.R.Civ.P. 54(d)(2)(C), ATTORNEYS FEES AND COSTS ARE AWARDED TO THE PLAINTIFF, JANET SCOTT-HARRIS, IN THE TOTAL AMOUNT OF EIGHTY-THREE THOUSAND ONE HUNDRED SEVENTY-NINE DOLLARS AND SEVENTY CENTS (\$83,179.70) AGAINST THE DEFENDANTS CITY OF FALL RIVER, MARILYN RODERICK AND DANIEL E. BOGAN, JOINTLY AND SEVERALLY. The current rate of post-judgment interest is 5.7% per annum. cc/cl (dlw) [Edit date 08/15/95] [1:91cv12057]
- 8/18/95 136 Notice of appeal by Fall River, City of in 1:91-cv-12057 filed. Fee Status: pd Fee Amount: \$ 105.00 Receipt #: 110975 Appeal record due on 9/17/95 (mmh) [Entry date 08/28/95] [1:91cv12057]
- 8/21/95 137 Notice of appeal by Marilyn Roderick in 1:91-cv-12057 filed. Fee Status: pd Fee Amount: \$ 105.00 Receipt #: 110995 Appeal record due on 9/20/95 (mmh) [Entry date 08/28/95] [1:91cv12057]
- 8/24/95 138 Notice of appeal by Daniel E. Bogan in 1:91-cv-12057 filed. Fee Status: pd Fee Amount: \$ 105.00 Receipt #: 111101

Appeal record due on 9/23/95 (mmh) [Entry date 08/28/95] [1:91cv12057]

- 8/28/95 139 Letter by Stephen C. Fulton in 1:91-cv-12057 dated: August 28, 1995 to: Ms. Cloonan re: Request for transcripts on behalf of all defendants. filed. (scj) [Entry date 08/31/95] [1:91cv12057]
- 8/28/95 - Notice of Docketing Record on Appeal from USCA re: , received. USCA NUMBER: 95-1952 (mmh) [Entry date 09/07/95] [1:91cv12057]
- 9/1/95 - Certified copy of docket and record on appeal forwarded to U.S. Court of Appeals re: . (mmh) [Entry date 09/05/95] [1:91cv12057]
- 9/6/95 143 Notice of appeal by Janet Scott-Harris in 1:91-cv-12057 filed. Appeal record due on 10/6/95 (mmh) [Entry date 10/02/95] [1:91cv12057]
- 9/7/95 - Notice of Docketing Record on Appeal from USCA re: , received. USCA NUMBER: 95-1950, 95-1951 (mmh) [1:91cv12057]
- 9/7/95 140 Letter by Stephen C. Fulton in 1:91-cv-12057 dated: 9/5/95 to: Ms. Whitney: re: In reviewing the Court's judgment on Attny's fees dated 8/14/95 I noticed that no mention was made of the plaintiff's third supplemental motion for attorneys fees. . . . (see letter), filed. (tap) [Entry date 09/08/95] [1:91cv12057]
- 9/13/95 - Docket entry dated 06/28/95 (endorsement on #128, third supplemental motion for attorneys fees) EDITED to



reflect that the motion was DENIED IN PART. Counsel's claim for time spent on the c.93A action against the insurer was specifically EXCLUDED. Otherwise, the third supplemental fee petition was allowed. (dlw) [1:91cv12057]

- 9/13/95 - Followup telecon. w/Atty Sweeney of Harvey Schwartz' office, re ltr dated 09/05/95 (docket no. 140). Atty Schwartz' assertion in ltr that judgment on attorneys fees is incorrect as to amount is correct (see above remark of this date). Counsel will move for amended judgment on attorneys fees. ' (dlw) [1:91cv12057]
- 9/15/95 141 Motion by Janet Scott-Harris in 1:91-cv-12057 to amend [135-1] judgment on attorneys fees, filed. (dlw) [1:91cv12057]
- 9/22/95 142 Motion by Janet Scott-Harris in 1:91-cv-12057 for leave to file a notice of appeal on the grounds that the original Notice of Appeal was served and mailed to the Clerk's Office on September 5, 1995, however it was never received for docketing. filed, c/s. (scj) [Entry date 09/25/95] [Edit date 10/04/95] [1:91cv12057]
- 9/28/95 - Second Notice of Appeal received for filing with the Office of the Clerk - (Notice is held in the session while original notice is being searched for in the District Court as well as the Court of Appeals) (scj) [Entry date 10/04/95] [1:91cv12057]

- 9/29/95 - Judge Patti B. Saris. Endorsed Order entered granting without opposition [141-1] motion to amend [135-1] judgment on attorneys fees, cc/cl w/77(d) certificate. (dlw) [Entry date 10/06/95] [1:91cv12057]
- 10/2/95 - Original Notice of Appeal, which was mailed to the District Court on September 5, 1995 is recovered by the Appeals Coordinator. Original Notice was found to have been routed to the Court of Appeals, prior to docketing in the District Court. (scj) [Entry date 10/04/95] [1:91cv12057]
- 10/6/95 19 Judge Patti B. Saris. AMENDED Judgment on attorneys fees entered for Janet Scott-Harris in 1:91-cv-12057 against Marilyn Roderick in 1:91-cv-12057, Daniel E. Bogan in 1:91-cv-12057, City of Fall River, jointly and severally, in 1:91-cv-12057. Principal: \$ 90,401.18, and post-judgment interest at the rate of of [sic] 5.89% per annum; cc/cl w/77(d) certificate. (dlw) [1:91cv12057]
- 10/11/95 - Notice of Docketing Record on Appeal from USCA re: , received. USCA NUMBER: 95-2100 (mmh) [Entry date 10/13/95] [1:91cv12057]
- 10/12/95 - Certified copy of docket and record on appeal forwarded to U.S. Court of Appeals re: . (mmh) [Entry date 10/13/95] [1:91cv12057]
- 10/23/95 - USCA appeal fees received Fee Status: pd Fee Amount: \$ 105.00 Receipt #: 112140 (mmh) [1:91cv12057]

- 10/25/95 144 Notice to counsel that exhibits shall be disposed of if they are not picked up within 30 days of the date of this notice. Documentary exhibits are returned herewith. Counsel should make arrangements to collect the remaining oversized exhibits. cc/cl by DLW (scj) [Entry date 11/07/95] [Edit date 11/07/95] [1:91cv12057]
- 11/3/95 145 Letter dated: November 3, 1995 to: Steve Fulton re: Request that counsel distribute the documentary exhibits enclosed with notice issued on 10/25/95. cc/cl (scj) [Entry date 11/07/95] [Edit date 11/07/95] [1:91cv12057]
- 11/8/95 146 Joint motion by Michael Plasski in 1:91-cv-12057, Leo Pellitier in 1:91-cv-12057, John Mitchell in 1:91-cv-12057, John Alberto in 1:91-cv-12057, Marilyn Roderick in 1:91-cv-12057, Robert L. Connors in 1:91-cv-12057, Daniel E. Bogan in 1:91-cv-12057, Fall River, City of in 1:91-cv-12057 to extend time to January 15, 1996 to to [sic] designate appendix contents and file their briefs. filed, c/s (scj) [Entry date 11/10/95] [Edit date 05/14/96] [1:91cv12057]
- 3/6/96 - Terminated document mooted [22-1] joint motion to extend time to January 15, 1996 to to [sic] designate appendix contents and file their briefs mooted [142-1] motion for leave to file a notice of appeal on the grounds that the original Notice of Appeal was served and mailed to the Clerk's Office on September 5, 1995, however it was never

- received for docketing Requested by dw. (dlw) [1:91cv12057]
- 5/14/96 147 Transcript of proceedings for held on proceeding date: May 16, 1994 before Judge: Saris. Court Reporter: Marie Cloonan (scj) [Edit date 05/14/96] [1:91cv12057]
- 5/14/96 148 Transcript of proceedings for held on proceeding date: May 17, 1994 before Judge: Saris. Court Reporter: Marie Cloonan (scj) [Edit date 05/14/96] [1:91cv12057]
- 5/14/96 149 Transcript of proceedings for held on proceeding date: May 18, 1994 before Judge: Saris. Court Reporter: Marie Cloonan (scj) [1:91cv12057]
- 5/14/96 150 Transcript of proceedings for held on proceeding date: May 20, 1994 before Judge: Saris. Court Reporter: Marie Cloonan (scj) [1:91cv12057]
- 5/14/96 151 Transcript of proceedings for held on proceeding date: May 23, 1994 before Judge: Saris. Court Reporter: Marie Cloonan (scj) [1:91cv12057]
- 5/14/96 152 Transcript of proceedings for held on proceeding date: May 24, 1994 before Judge: Saris. Court Reporter: Marie Cloonan (scj) [1:91cv12057]
- 5/14/96 153 Transcript of proceedings for held on proceeding date: May 25, 1994 before Judge: Saris. Court Reporter: Marie Cloonan (scj) [1:91cv12057]



5/23/96 - Transmitted supplemental record on  
 appeal: re: . (mmh) [Entry date  
 05/24/96] [1:91cv12057]

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UNITED STATES DISTRICT COURT  
 FOR THE DISTRICT OF MASSACHUSETTS

JANET SCOTT-HARRIS )

Plaintiff )

v. )

CITY OF FALL RIVER, )

MASSACHUSETTS; DANIEL E. ) **91-12057WD**

BOGAN, individually and in his )  
 former official capacity as Mayor )  
 of the City of Fall River, )

Massachusetts; ROBERT L. )

CONNORS, individually and in )  
 his official capacity as City )

Administrator of the City of Fall )  
 River, Massachusetts; MARILYN )

RODERICK, individually and in ) (Filed  
 her official capacity as a member ) Aug. 5, 1991)  
 of the Fall River City Council; )

JOHN ALBERTO, individually )  
 and in his official capacity as a )  
 member of the Fall River City )

Council; JOHN MITCHELL, )  
 individually and in his official )  
 capacity as a member of the Fall )

River City Council; LEO )

PELLITIER, individually and in )  
 his official capacity as a member )  
 of the Fall River City Council; )

and MICHAEL PLASSKI, )

individually and in his official )  
 capacity as a member of the Fall )  
 River City Council )

Defendants )

## COMPLAINT

### Introduction

1. This is a civil rights action against the City of Fall River, Massachusetts, its former mayor, city administrator and members of the city council for the racially and sexually motivated discharge of the city's Administrator of Health and Human Services. The complaint alleges that Ms. Scott-Harris' position was eliminated in a sham budget-cutting action because she was Black, because she was a woman, because she was outspoken in her opposition to racism among city employees and because she was not a member of the City Hall establishment. The complaint seeks compensatory and punitive damages.

### Jurisdiction and venue

2. This action is brought pursuant to 42 U.S.C. §§ 1981 and 1983 and the First and Fourteenth Amendments to the United States Constitution. Jurisdiction is founded on 28 U.S.C. §§ 1331 and 1343.
3. The plaintiff further invokes the supplemental jurisdiction of this Court pursuant to 28 U.S.C. §1367 and the pendent jurisdiction of this Court to hear and decide her claims arising under state law.
4. All individual parties are residents of Massachusetts. The municipal defendant is located in Massachusetts.

### Parties

5. Plaintiff Janet Scott-Harris is a citizen of the United States and a resident of the Commonwealth of Massachusetts. She is a Black woman.

6. The defendant City of Fall River, Massachusetts is a municipal corporation formed under the laws of the Commonwealth of Massachusetts. It is a subdivision of the Commonwealth of Massachusetts.
7. The defendant Daniel E. Bogan was at times relevant to this action the acting Mayor of the City of Fall River. He is a citizen of the United States and a resident of Fall River. He is named in his official and his individual capacities.
8. The defendant Robert L. Connors was at times relevant to this action the City Administrator of the City of Fall River. He is a citizen of the United States and a resident of Fall River. He is named in his official and his individual capacities.
9. The defendant Marilyn Roderick, was at times relevant to this action a member of the Fall River City Council. She is a citizen of the United States and a resident of Fall River. She is named in her official and her individual capacities.
10. The defendant John Alberto, was at times relevant to this action a member of the Fall River City Council. He is a citizen of the United States and a resident of Fall River. He is named in his official and his individual capacities.
11. The defendant John Mitchell was at times relevant to this action a member of the Fall River City Council. He is a citizen of the United States and a resident of Fall River. He is named in his official and his individual capacities.
12. The defendant Leo Pellitier was at times relevant to this action a member of the Fall River City Council. He is a citizen of the United States and a resident of Fall River. He is named in his official and his individual capacities.



13. The defendant Michael Plasski was at times relevant to this action a member of the Fall River City Council. He is a citizen of the United States and a resident of Fall River. He is named in his official and his individual capacities.

#### Facts

14. In 1987 as part of a reorganization of city government based on the recommendations of the Fall River Area Task Force, a number of health and human services agencies of the city were placed under the supervision of a newly-created position of Administrator of Health and Human Services.
15. Following a nationwide search, Ms. Scott-Harris was offered the post of Administrator of Health and Human Services.
16. In reliance on that offer Ms. Scott-Harris resigned from a position in Ohio and relocated with her family to Fall River. She began working for the city in September 1987.
17. During the period of her employment in Fall River the administration of the city government was made up almost entirely of white males. Ms. Scott-Harris was the only black person in an administrative position. She was one of only three women in administrative positions.
18. Ms. Scott-Harris refused to tolerate racial bias among city employees in her departments. Her refusal to accept this attitude upset the city government establishment.
19. As an example, Ms. Scott-Harris was instrumental in insisting on the dismissal of a supervisory employee

- who publicly referred to black employees as "niggers" and "black bitches" and who referred to Ms. Scott-Harris as "that black nigger bitch."
20. That employee who Ms. Scott-Harris insisted be dismissed was a longtime city employee with political connections throughout the administration.
21. The employee was placed on suspension without pay as a direct result of Ms. Scott-Harris' efforts but the employee was then permitted to immediately apply for and obtain disability pay while she purportedly was under the direct treatment of the chairman of the city's board of health. The employee was removed from disability status the day after Ms. Scott-Harris was terminated and was promoted to a new position with an additional cost to the city of \$18,000.
22. Ms. Scott-Harris was treated differently in the terms and conditions of her employment than were white males in comparable positions.
23. As an example, Ms. Scott-Harris was denied administrative benefits allowed to white male city administrators in comparable positions, such as the use of a city automobile, out-of-state travel and even an assigned parking place.
24. On February 12, 1991 Ms. Scott-Harris was informed by the defendant Connors, the City Administrator, that her position was to be eliminated by the City Council for economic reasons. He said her last day of employment would be March 29, 1991.
25. On March 26, 1991 the defendant members of the Fall River City Council voted to eliminate Ms. Scott-Harris' position.
26. The reason given for Ms. Scott-Harris' termination was a sham.

27. The vote to eliminate Ms. Scott-Harris' position entirely was a sham undertaken only because the defendant Bogan, as an acting mayor only, was without authority to terminate her.
28. No other members of the city administration were terminated "for economic reasons."
29. No other cutbacks in city government were taken for "economic reasons."
30. The defendants Mayor Bogan and City Administrator Connors publicly stated at City Council meetings and in newspaper interviews at various times in March 1991 that they had no complaints about the plaintiff's performance of her duties and, in fact, that they were pleased with Ms. Scott-Harris' performance. They said she was being eliminated solely for economic reasons.
31. The elimination of Ms. Scott-Harris' position did not save any money for the city because her duties were reassigned to three positions that at the time of her termination were vacant. Within one month of Ms. Scott-Harris' discharge the city hired two white males and one white female to perform the duties Ms. Scott-Harris had previously performed. Ms. Scott-Harris' annual salary had been \$48,000. The combined annual salaries of the three persons hired to replace Ms. Scott-Harris were \$105,000.
32. On February 20, 1991 Mayor Bogan wrote to Ms. Scott-Harris informing her that her position was to be eliminated because of "an anticipated 10% reduction in local aid for FY92."
33. In fact, Ms. Scott-Harris was fired in the midst of Fiscal Year 1991, when funds for her position had already been appropriated and were available. In addition, the city's state aid was not reduced by 10

- percent for fiscal year 1992 and the city never instituted other employee layoffs for "economic reasons."
34. In his February 20, 1991 letter Mayor Bogan offered Ms. Scott-Harris the position of Director of Public Health at a salary reduction of nearly \$12,000.
  35. The offer of the position of Director of Public Health was a sham. Mayor Bogan did not believe Ms. Scott-Harris would accept a position with such a drastic salary reduction.
  36. On February 28, 1991 Ms. Scott-Harris wrote to Mayor Bogan and stated that she would "accept your most gracious offer, appointment to the position Director, Public Health."
  37. Surprised that Ms. Scott-Harris had accepted the position, Mayor Bogan wrote to her on March 1, 1991 stating that he was imposing a number of additional duties not included in the position when it was offered to Ms. Scott-Harris. These additional duties and responsibilities included supervision of such disparate departments as Minimum Housing, Food & Milk inspections, sanitary inspections, and weights and measures. He also told Ms. Scott-Harris that the office of the director of public health was being relocated to a less desirable location.
  38. On March 4, 1991 Ms. Scott-Harris wrote to Mayor Bogan expressing her concern about the additional responsibilities and duties imposed on the position as compared with the previous status of the position since there was to be no increase in compensation. She requested that he provide her with "a complete outline, projects to be managed, positions to be directed, with staffing, location and budget assignments," which information, she said, "would be helpful toward resolution of these concerns."



39. Mayor Bogan treated Ms. Scott-Harris' March 4, 1991 letter as a rejection of his employment offer and refused to discuss the matter further with Ms. Scott-Harris or her attorney, announcing publicly that she had declined the job offer.
40. The individual defendants are the policy making officials of the City of Fall River.
41. In all of the above actions the defendants were acting under color of the laws of the Commonwealth of Massachusetts.
42. All of the above actions were taken deliberately and with the intention of depriving Ms. Scott-Harris of her position with the City of Fall River and with the intention of treating Ms. Scott-Harris under different terms and conditions in her employment than white males were treated.
43. All of the above actions were taken in retaliation for Ms. Scott-Harris' refusal to tolerate a racially discriminatory atmosphere among the employees she supervised.

COUNT ONE  
EQUAL PROTECTION VIOLATION  
42 U.S.C. §§ 1981 and 1983 claim

The plaintiff repeats and realleges all the foregoing paragraphs.

44. By the above conduct the defendants violated the plaintiff's right to equal protection of the laws, as provided by the Fourteenth Amendment to the United States Constitution.

COUNT TWO  
FREE SPEECH VIOLATION  
42 U.S.C. § 1983 claim

The plaintiff repeats and realleges all the foregoing paragraphs.

45. By the above conduct the defendants violated the plaintiff's right to freedom of speech, as provided by the First and Fourteenth Amendments to the United States Constitution.

COUNT THREE  
WRONGFUL TERMINATION  
Massachusetts common law claim

The plaintiff repeats and realleges all the foregoing paragraphs.

46. The plaintiff was discharged from her position for reasons in violation of public policy.
47. The plaintiff relied on the defendant city's offer of employment to her detriment by giving up her existing employment and by relocating with her family to Fall River.
48. This detrimental reliance by the plaintiff created an implied contract of employment that she could only be terminated for cause.
49. The defendants had no cause for terminating the plaintiff's employment.

COUNT FOUR  
MASSACHUSETTS EQUAL RIGHTS ACT  
M.G.L. c. 93 § 102 claim

The plaintiff repeats and realleges all the foregoing paragraphs.

50. The plaintiff was discriminated against in the terms and conditions of her employment and was terminated from her employment because of her race and her sex, in violation of her rights as provided by M.G.L. c. 93 § 102.

AS A RESULT of the above conduct by the defendants the plaintiff was denied her employment and the benefits of that employment, her reputation and good name were damaged, and she suffered great emotional distress and anxiety.

WHEREFORE the plaintiff demands judgment against the defendants, jointly and severally, for the full amount of her damages, plus punitive damages, plus her costs of this action, including reasonable attorneys fees, and prejudgment interest pursuant to state and federal law.

#### Jury demand

The plaintiff demands trial by jury.

Janet Scott-Harris, plaintiff  
By her attorneys,

/s/ Harvey A. Schwartz  
HARVEY A. SCHWARTZ  
Schwartz, Shaw & Griffith  
205 Portland Street  
Boston, Massachusetts 02114  
(617) 227-2414  
BBO # 448080

#### UNITED STATE [sic] DISTRICT COURT DISTRICT OF MASSACHUSETTS

JANET SCOTT-HARRIS	)	C.A. NO. 91-12057WD
	)	
Plaintiff	)	
	)	
V.	)	
	)	
CITY OF FALL RIVER	)	
MASSACHUSETTS, et al.	)	
	)	
Defendants	)	

ANSWER OF DEFENDANT CITY OF FALL RIVER,  
DANIEL E. BOGAN, ROBERT L. CONNORS,  
MARILYN RODERICK, JOHN ALBERTO  
JOHN MITCHELL, LEO PELLETIER  
AND MICHAEL PLASSKI

#### INTRODUCTION

1. The Defendants deny the allegations contained in Paragraph 1.

#### JURISDICTION AND VENUE

2. The statements contained in Paragraph 2 are statements of jurisdiction to which an answer is not required.

3. The statements contained in Paragraph 3 regard jurisdiction and do not, therefore, require an answer.

4. The Defendants admit the allegations contained in Paragraph 4.



### PARTIES

5. The Defendants admit the allegations contained in Paragraph 5.

6. The Defendants admit the allegation is contained in Paragraph 6.

7. The Defendants admit the allegations contained in Paragraph 7.

8. The Defendants admit the allegations contained in Paragraph 8.

9. The Defendants admit the allegations contained in Paragraph 9.

10. The Defendants admit the allegations contained in Paragraph 10.

11. The Defendants admit the allegations contained in Paragraph 11.

12. The Defendants admit the allegations contained in Paragraph 12.

13. The Defendants admit the allegations contained in Paragraph 13.

### FACTS

14. The Defendants admit the allegations contained in Paragraph 14.

15. The Defendants admit the allegations contained in Paragraph 15.

16. The Defendants admit that the Plaintiff accepted the position in Fall River and began working here in

September of 1987. The defendants are without sufficient knowledge or belief as to the remaining allegations and therefore deny same.

17. The Defendants admit the allegations contained in Paragraph 17.

18. The Defendants are without sufficient knowledge or belief as to the allegations contained in Paragraph 18 and therefore deny same.

19. The Defendants admit that the Plaintiff complained against an employee of the City of Fall River for racial remarks and that the employee was immediately disciplined according to the Civil Service procedures and progressive discipline policies of the City.

20. The Defendants admit that the employee involved in the disciplinary action worked for the City for a number of years but are without sufficient knowledge or belief to admit the remaining allegations contained in Paragraph 20, and therefore deny same.

21. The Defendants admit that the employee was suspended and that the employee thereafter qualified for a medical disability but deny that the employee was promoted upon returning to work and deny the remaining allegations and inferences contained in Paragraph 21.

22. The Defendants deny the allegations contained in Paragraph 22.

23. The Defendants deny the allegations contained in Paragraph 23.

24. The Defendants admit that at a meeting of all department heads, Plaintiff was told of the elimination of

her position in the context of the budgetary constraints facing the City and that the City Council would be taking action on eliminating the position. The last day of her employment was calculated in an effort to facilitate continued salary payments to the Plaintiff for unused sick time and vacation time through the end of the fiscal year.

25. The Defendants admit the allegations contained in Paragraph 26.

26. The Defendants deny the allegations contained in Paragraph 26.

27. The Defendants deny the allegations contained in Paragraph 27.

28. The Defendants deny the allegations contained in Paragraph 28.

29. The Defendants deny the allegations contained in Paragraph 29.

30. The Defendants admit the allegations contained in Paragraph 30.

31. The Defendants deny the allegations contained in Paragraph 31.

32. The Defendants admit the allegations contained in Paragraph 32.

33. The Defendants deny the allegations contained in Paragraph 33 and further state that the termination date was calculated so that the Plaintiff would continue to receive regular salary payments through the end of the fiscal year based upon unused sick time and vacation time. In addition, state aid was reduced by more than 10

percent for fiscal year 1992 and other employees were laid off for economic reasons.

34. The Defendants admit the allegations contained in Paragraph 34.

35. The Defendants deny the allegations contained in Paragraph 35.

36. The Defendants admit the allegations contained in Paragraph 36.

37. The Defendants deny the allegations contained in Paragraph 37.

38. The Defendants admit that a letter was received from the Plaintiff dated March 4, 1991 but deny the remaining allegations contained in Paragraph 38.

39. The Defendants admit that Mayor Bogan acknowledged the Plaintiff's decision not to accept the position of Director of Public Health, but deny the remaining allegations contained in Paragraph 39.

40. The Defendants admit the allegations contained in Paragraph 40.

41. The Defendants admit the allegations contained in Paragraph 41.

42. The Defendants deny the allegations contained in Paragraph 42.

43. The Defendants deny the allegations contained in Paragraph 43.

44. The Defendants deny the allegations contained in Paragraph 45 [sic].



45. The Defendants deny the allegations contained in Paragraph 45.

46. The Defendants deny the allegations contained in Paragraph 46.

47. The Defendants deny the allegations contained in Paragraph 47.

48. The Defendants deny the allegations contained in Paragraph 48.

49. The Defendants deny the allegations contained in Paragraph 49.

50. The Defendants deny the allegations contained in Paragraph 50.

WHEREFORE, the Defendants request this complaint to be dismissed with costs and attorney's fees.

#### FIRST AFFIRMATIVE DEFENSE

1. Plaintiff's Complaint fails to state a claim upon which relief can be granted.

#### SECOND AFFIRMATIVE DEFENSE

2. The Defendants state that service of the Complaint was improper and insufficient.

#### THIRD AFFIRMATIVE DEFENSE

3. Plaintiff's Complaint fails to state a claim upon which relief can be granted under 42 U.S.C. Sec. 1981 and 1983 because the facts alleged do not constitute a violation of the Plaintiff's right to equal protection of the laws.

#### FOURTH AFFIRMATIVE DEFENSE

4. The actions of the Defendants were taken in good faith and in proper exercise of their public duties pursuant to established policies.

#### FIFTH AFFIRMATIVE DEFENSE

5. The Plaintiff's claim fails to state any valid claim under Federal Law and accordingly, this Court lacks jurisdiction over the subject matter of any alleged claims by Plaintiff under State Law, and Plaintiff's Complaint should therefore be dismissed.

#### SIXTH AFFIRMATIVE DEFENSE

6. The Defendants state that their actions were in good faith based on a reasonable belief that those actions were constitutionally proper.

#### SEVENTH AFFIRMATIVE DEFENSE

7. The individually-named Defendants were acting solely in the course of their public office and in the best interest of the City of Fall River, and are therefore inappropriately named as Defendants in their individual capacities.

#### EIGHTH AFFIRMATIVE DEFENSE

8. The Plaintiff's Complaint fails to state any basis upon which a claim exists for violation of the Plaintiff's right to freedom of speech, and should therefore be dismissed.

NINTH AFFIRMATIVE DEFENSE

9. The Plaintiff's rejection of the alternate position offered to her after the elimination of her position through the restructuring of the City administration, was the sole reason for departure from City employment and does not constitute wrongful termination.

TENTH AFFIRMATIVE DEFENSE

10. The Plaintiff has failed to state any factual basis for her claim under the state equal rights act that she was discriminated against because her race and gender, and such claim should accordingly be dismissed.

ELEVENTH AFFIRMATIVE DEFENSE

11. The Plaintiff knew or should have known of the financial and budgetary problems confronting the City of Fall River and that elimination of her position to return to a prior organizational system was a necessary and justifiable cost-cutting measure.

TWELFTH AFFIRMATIVE DEFENSE

12. The Plaintiff's claim that she was terminated due to her race and gender is without a factual basis and are matters which the Plaintiff has conceded were not factors in the elimination of her position.

WHEREFORE, the Plaintiff's Complaint should be dismissed with costs.

THE DEFENDANTS REQUEST A TRIAL BY JURY.

CITY OF FALL RIVER, MA,  
DANIEL E. BOGAN, ROBERT L.  
CONNORS, MARILYN  
RODERICK, JOHN ALBERTO,  
JOHN MITCHELL, LEO  
PELLETIER AND MICHAEL  
PLASSKI

By their attorney,

/s/ Bernadette L. Sabra  
Bernadette L. Sabra  
Assistant Corporation  
Counsel  
BBO #4370201  
Law Dept.,  
1 Government Center  
Fall River, MA 02722  
(508) 324-2650

Dated: August 29, 1991

CERTIFICATE OF SERVICE

I, do hereby certify that a true copy of the foregoing was mailed this day, postage prepaid, to Harvey A. Schwartz, Schwartz, Shaw & Griffith, 205 Portland Street, Boston, MA 02114, attorney for the Plaintiff.

/s/ Bernadette L. Sabra  
Bernadette L. Sabra

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SCHWARTZ, SHAW & GRIFFITH  
 205 PORTLAND STREET  
 BOSTON, MA 02114  
 (617) 227-2414  
 FAX (617) 227-1842

FACSIMILE TRANSMISSION

DATE: April 5, 1993

TO: Stephen C. Fulton FAX NO.: 439-3153  
 TO: Bruce Assad FAX NO.: 508 674-5622  
 TO: Robert Marchand FAX NO.: 508 677-4870  
 TO: FAX NO.:  
 TO: FAX NO.:  
 FROM: Harvey A. Schwartz  
 Schwartz, Shaw & Griffith

RE: Janet Scott-Harris v. City of Fall River

NO. OF PAGES INCLUDING TRANSMITTAL PAGE: 1

COMMENTS OR INSTRUCTIONS:

Gentlemen:

Here is the dismissal I propose to file at the pretrial conference Thursday. We can all sign at the deposition Wednesday.

Harvey A. Schwartz

UNITED STATES DISTRICT COURT  
 FOR THE DISTRICT OF MASSACHUSETTS

JANET SCOTT-HARRIS )

Plaintiff )

v. )

CITY OF FALL RIVER,  
 MASSACHUSETTS; et al. )

Defendants )

CA NO.  
 91-12057 WD

VOLUNTARY DISMISSAL

The parties hereby stipulate that all counts against the following defendants shall be dismissed with prejudice and without costs:

JOHN ALBERTO, individually and in his official capacity as a member of the Fall River City Council; JOHN MITCHELL, individually and in his official capacity as a member of the Fall River City Council; LEO PELLITIER, individually and in his official capacity as a member of the Fall River City Council; and MICHAEL PLASSKI, individually and in his official capacity as a member of the Fall River City Council.

Janet Scott-Harris, plaintiff  
 By her attorneys,

HARVEY A. SCHWARTZ  
 Schwartz, Shaw & Griffith  
 205 Portland Street  
 Boston, Massachusetts  
 02114  
 (617) 227-2414  
 BBO # 448080

City of Fall River and all  
defendants in their official  
capacities By their attor-  
neys,

---

Stephen C. Fulton  
Long, Raicot & Bourgois  
200 State Street  
Boston MA 02109

Defendant Daniel Bogan  
By his attorneys,

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Robert Marchand  
Driscoll, Marchand  
& Boyer  
206 Winter Street  
PO Box 2527  
Fall River MA 02722

Defendants Roderick, Connors, Alberto,  
Pelletier and Plassakis in their individual capacities,  
By their attorneys,

---

Bruce Assad  
10 Purchase Street  
Fall River MA 02720

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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

JANET SCOTT-HARRIS )

Plaintiff )

v. )

CITY OF FALL RIVER,  
MASSACHUSETTS; et al. )

Defendants )

CA NO.

91-12057 WD

**VOLUNTARY DISMISSAL**

The parties hereby stipulate that all counts against  
the following defendants shall be dismissed with preju-  
dice and without costs:

JOHN ALBERTO, individually and in his official  
capacity as a member of the Fall River City  
Council; JOHN MITCHELL, individually and in  
his official capacity as a member of the Fall  
River City Council; LEO PELLITIER, individu-  
ally and in his official capacity as a member of  
the Fall River City Council; and MICHAEL  
PLASSKI, individually and in his official capac-  
ity as a member of the Fall River City Council.

Janet Scott-Harris, plaintiff  
By her attorneys,

/s/ Harvey A. Schwartz  
HARVEY A. SCHWARTZ  
Schwartz, Shaw & Griffith  
205 Portland Street  
Boston, Massachusetts  
02114  
(617) 227-2414  
BBO # 448080



City of Fall River and all  
defendants in their official  
capacities By their attor-  
neys,

/s/ Stephen C. Fulton  
Stephen C. Fulton  
Long, Raicot  
& Bourgois  
200 State Street  
Boston MA 02109

/s/ Robert Marchand  
Robert Marchand  
Driscoll, Marchand  
& Boyer  
206 Winter Street  
PO Box 2527  
Fall River MA 02722

Defendants Roderick, Connors, Alberto,  
Pelletier and Plassakis in their individual capacities,  
By their attorneys,

/s/ Bruce Assad  
Bruce Assad  
10 Purchase Street  
Fall River MA 02720

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

CIVIL ACTION  
NO. 91-12057-WD

JANET SCOTT-HARRIS,

Plaintiff

vs.

CITY OF FALL RIVER,  
Massachusetts; DANIEL E.  
BOGAN, individually and in his  
former official capacity as Mayor  
of the City of Fall River, ROBERT  
L. CONNORS, as Administrator  
of the City of Fall River,  
Massachusetts; MARILYN  
RODERICK, individually and in  
her official capacity as a member  
of the Fall River City Council,

Defendants

MOTION TO  
DISMISS

Now comes the Defendant, Daniel E. Bogan, and  
moves this Honorable Court to Dismiss Counts I and II  
against him individually and gives as his reasons that  
during all times material, he was exercising his duties as  
Mayor of the City of Fall River and was, thus, entitled to  
absolute immunity for those acts.

Respectfully submitted,

DANIEL E. BOGAN, Defendant  
By his attorney,

By: /s/ Robert J. Marchand  
Robert J. Marchand,  
 Esquire  
 DRISCOLL,  
 MARCHAND & BOYER  
 206 Winter Street,  
 P.O. Box 2527  
 Fall River, MA 02722  
 (508) 672-8652  
 DATED: May 3, 1994

[5/16/94 Denied as untimely.  
 Patti B. Saris]

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UNITED STATES DISTRICT COURT  
 FOR THE DISTRICT OF MASSACHUSETTS

C.A. NO. 91-12057

JANET SCOTT-HARRIS, )  
 Plaintiff )  
 vs. )  
 CITY OF FALL RIVER, )  
 MASSACHUSETTS; DANIEL E. )  
 BOGAN, individually and in his )  
 former official capacity as Mayor )  
 of the City Administrator of the )  
 City of Fall River, Massachusetts; )  
 ROBERT L. CONNORS, )  
 individually and in his official )  
 capacity as a member of the Fall )  
 River City Council; MARILYN )  
 RODERICK, individually and in )  
 her official capacity as a member )  
 of the Fall River City Council; )  
 Defendants )

**MOTION TO DISMISS**

Now comes the Defendant, Marilyn Roderick, and moves this Honorable Court dismiss the above action on the grounds that said Complaint fails to state a claim against the Defendant, Marilyn Roderick, upon which relief may be granted.



Respectfully submitted,

/s/ Bruce A. Assad  
 Bruce A. Assad, Esquire  
 10 Purchase Street  
 P.O. Box 1268  
 Fall River, MA 02722-1268  
 (508) 673-2004

/s/ Stephen C. Fulton  
 Stephen C. Fulton, Esquire  
 Long, Racicot & Bourgeois  
 200 State Street  
 Boston, MA 02109  
 (617) 439-4777

DATED: May 4, 1994

[5/16/94 Denied as untimely.  
 Patti B. Saris]

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UNITED STATES DISTRICT COURT  
 FOR THE DISTRICT OF MASSACHUSETTS

C.A. NO. 91-12057

JANET SCOTT-HARRIS, )  
 Plaintiff )

vs. )

CITY OF FALL RIVER, )  
 MASSACHUSETTS; DANIEL E. )  
 BOGAN, individually and in his )  
 former official capacity as Mayor )  
 of the City Administrator of the )  
 City of Fall River, Massachusetts; )  
 ROBERT L. CONNORS, )  
 individually and in his official )  
 capacity as a member of the Fall )  
 River City Council; MARILYN )  
 RODERICK, individually and in )  
 her official capacity as a member )  
 of the Fall River City Council; )

Defendants )

MEMORANDUM IN SUPPORT OF DEFENDANT,  
 MARILYN RODERICK'S MOTION TO DISMISS

Now comes the Defendant, Marilyn Roderick, and moves this Honorable Court dismiss the above action on the grounds that said Complaint fails to state a claim against the Defendant, Marilyn Roderick, upon which relief may be granted.

Defendant, Marilyn Roderick, both individually and in her official capacity as a City Councillor is entitled to

**absolute immunity** from federal damage claims including Section 1983 Title 42, U.S. Code actions for conduct undertaken in her legislative capacity.

(*Hogan v. South Lebanon* 596 NE 2d 1092 (Ohio App 12 Dist 1991); *Cutting v. Muzzey* 724 F2d 259 (1984); *Haskell v. Washington Twp.* (C.A. 6, 1988) 864 F2d 1266, 1277; *Healy v. Town of Pembroke Park* (C.A. 11, 1987) 831 F2d 989, 993; *Gorman Towers Inc. v. Bogoslavsky* (C.A. 8, 1980), 626 F2d 607, 611-613. *Tenney v. Brandhove* (1951) 341 U.S. 367, 71 S. Ct. 783, 95 L.Ed. 1019 *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency* 440 U.S. 391, 99 S. Ct. 1171, 59 L.Ed. 2d 401 (1979); *Latino Political Action Committee Inc. v. City of Boston* 581 F. Supp. 478.

The Defendant, Marilyn Roderick, voted, in her legislative capacity as a City Councillor, to amend the Ordinance establishing the said Department of Health and Human Services. Significantly, five other members of the City Council representing a majority vote, notwithstanding the vote of the defendant Marilyn Roderick, voted to amend said Ordinance, thereby eliminating the Department of Health and Human Services including the position of Administrator of Health and Human Services as part of a restructuring of city government.

The Plaintiff, Janet Scott-Harris, alleges that her right to equal protection of the laws, as protected by the 14th Amendment, was violated by the elimination of her position and the termination of her employment, in violation of 42 U.S.C. Section 1983.

The elimination of the Department of Health and Human Services as a part of a restructuring of city government was a **legislative** process accomplished in accordance with the Revised Ordinances of the City of Fall River.

**The Department of Health and Human Resources was legislatively established by Ordinance and therefore could only be eliminated by Ordinance.**

Pursuant to the Charter of the City of Fall River, Article II, Sections 18, 20 and 21, a majority of all members of the city council shall be necessary to adopt any ordinance. Dispositively, no ordinance shall be amended or repealed except by an ordinance adopted in accordance with the chapter. Every ordinance adopted by the City Council shall be presented to the Mayor for his approval. If he approves it, said ordinance shall be in force. If he disapproves said ordinance, the City Council must pass said ordinance by two-thirds ( $\frac{2}{3}$ rds) vote of all its members to be in force.

The Defendant, Marilyn Roderick, acting in her capacity as a City Councillor performing her legislative function is entitled to absolute immunity.

State legislators are absolutely immune from suit for actions taken pursuant to their legislative activity. *Tenney v. Brandhove*, 71 S.Ct. 783, 341 U.S. 367 (1951). Legislative immunity is absolute because

"The privilege would be of little value if they could be subjected to the cost and inconvenience and distraction of a trial upon a conclusion of the pleading, or to the hazard of a judgment



against them based upon a jury's speculation as to Motives." *Id.* at 788.

Essentially absolute immunity is provided to legislative activities so that individual legislators will not feel hindered in the performance of their function.

The Supreme Court's holding in *Tenney* has been extended to non-elected officials of a regional planning agency. *Lake Country Estates, Inc. v. Tahoe Reg-Plan*, 99 S.Ct. 1171, 440 U.S. 391 (1979). The Court felt that the same reasoning used to apply absolute immunity to state legislators also applied to regional legislators. *Id.* at 1179.

Finally absolute immunity has been applied to local legislators. *Latino Political Action Com. v. City of Boston*, 581 F. Supp. 478 (1984). The Court in *Latino Political Action Committee* again found the arguments applying absolute immunity to state and regional legislators equally persuasive for local legislators. *Id.* at 482. The Court stated:

"Certainly the threat of suit is as likely to inhibit a Boston City Councillor's decision making as it is to inhibit that of a state or regional legislator." *Id.*

Other Courts which have addressed the issue have extended Absolute Immunity to local legislators acting in their legislative capacities. See *Baker v. Mayor and City Council of Baltimore*, 894 F.2d [sic] 679 (4th Cir. 1990) *Rateree v. Rockett*, 852 F.2d 946 (7th Cir. 1988) and *Finch v. City of Vernon*, 877 F. 2d 1497 (11th Cir. 1989).

The Court in *Rateree*, supra, held that the action of a City Council in eliminating a position entirely was not administrative but was legislative and that the City

Councilors were entitled to absolute immunity. *Rateree*, at 950. The Court stated:

"Employment decisions are not administrative when accomplished through traditional legislative function. They are not 'employment decisions' at all but instead, legislative, public policy choices that necessarily impact on the employment policies of the governing body. The political decision making inevitably involved in exercising budgetary restraint strikes at the heart of the legislative process and is protected legislative conduct." *Id.*

It is clear from the foregoing that a local legislator who votes to eliminate a position for budgetary reasons is acting in a legislative capacity and is absolutely immune from suit.

In the case at bar, Marilyn Roderick is a local legislator. She is a duly elected member of the Fall River City Council. Plaintiff's only allegation of wrongdoing against the Defendant is that she voted in favor of the Ordinance eliminating the Department of Health and Human Services which included the position of Administrator of Health and Human Services.

The elimination of the Department of Health and Human Services was done to reduce the operating budget for the City of Fall River. One of the affects of this Ordinance was the elimination of Plaintiff's position as the Administrator of Health and Human Services.

The ordinance passed by the City of Fall River City Council was proposed and passed in furtherance of its normal and legitimate legislative activities. Further, Defendant's action of voting in favor of an ordinance,

which had the effect of eliminating Plaintiff's position, is a purely legislative function and was performed exclusively in her capacity as a member of the City Council. Therefore the Defendant, Marilyn Roderick, is entitled to absolute immunity from suit.

### CONCLUSION

Defendant, Marilyn Roderick, is a member of the Fall River City Council. As such she is accorded absolute immunity from suit for her legislative activities. Plaintiff's allegation of wrongdoing against the Defendant, Marilyn Roderick, is that she voted in favor a resolution eliminating the position of Administrator Health and Human Services. Said Ordinance was proposed and passed in furtherance of the City Council's normal and legitimate legislative activities. Defendant's action of voting in favor of said Ordinance was a purely legislative function performed exclusively in her capacity as a member of the City Council. Therefore Defendant, Marilyn Roderick, is absolutely immune from suit and Plaintiff's Complaint should be dismissed as it relates to the Defendant, Marilyn Roderick.

WHEREFORE, the Defendant, Marilyn Roderick, requests this Honorable Court dismiss this action against the Defendant, Marilyn Roderick with costs and applicable attorney's fees.

Respectfully submitted,

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DATED: May 4, 1994

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[Chartered and Related Laws -  
Fall River Revised Ordinances]

\* \* \*

In each city adopting any plan provided for by this chapter, the municipal year shall begin and end at ten o'clock in the morning of the first Monday of January in each year.

(Acts of 1915, c. 267, I, § 15; Acts of 1922, c. 237, § 3; Acts of 1933, c. 313, § 7; Acts of 1938, c. 378, § 5; Acts of 1941, c. 640, § 3)

**Sec. 16. No primaries or caucuses to be held.**

No primary or caucus for municipal officers shall be held, except in a city under Plan F. Candidates for mayor, city council and school committee, and assessors, if elected by the people, shall, except in a city under Plan F, be nominated in accordance with section six of chapter fifty-three.

(Acts of 1959, c. 448, § 5, approved Aug. 10, 1959; effective 90 days thereafter)

**Sec. 16A. Conduct of city primary and election under Plan F.**

**Editor's note** - This section was not printed herein as the city elected the Plan A form of government.

**Sec. 17. Certain officials to be sworn, time, etc.**

On the first Monday in January following a regular municipal election, at ten o'clock in the forenoon, the mayor-elect if elected by the people, the councillors-elect, and the assessors-elect if elected by the people, shall meet and be sworn to the faithful discharge of their duties. The

oath may be administered by the city clerk or by a justice of the peace, and a certificate thereof shall be entered in the journal of the city council. At any regular council meeting thereafter the oath may be administered in the presence of the city council to the mayor, or to any councillor absent from the meeting on the first Monday in January; provided, that under Plan E, the oath may be so administered to the mayor and vice-chairman at the same meeting at which they are respectively elected.

(Acts of 1915, c. 267, I, § 17; Acts of 1916, c. 68, § 2; Acts of 1922, c. 237, § 4; Acts of 1938, c. 378, § 6)

**Sec. 17A. Salaries of mayor, city manager and council.**

The mayor or city manager and the members of the city council shall receive for their services such salary as the city council shall by ordinance determine, and they shall receive no other compensation from the city, except that a member of a town council in a municipality with a town council form of government may receive a salary for serving as a municipal employee of said municipality in lieu of receiving compensation for serving as a member of said council. No increase or reduction in the salaries of mayor or city councillors shall take effect during the year in which such increase or reduction is voted, and no change in such salaries shall be made between the election of a new council and the qualification of the new council. The provisions of this section shall not be applicable in a city under Plan F.

(Acts of 1952, c. 259, § 2; Acts of 1958, c. 72, § 2; c. 513, § 2; Acts of 1959, c. 448, § 7, approved Aug. 10, 1959; effective

90 days thereafter; Acts of 1963, c. 731, § 1, approved October 1, 1963; Acts of 1985, c. 252, § 2)

**Sec. 17B. Compensation of mayor and council members of Plan F cities.**

**Editor's note** – This section was not present herein as the city elected the Plan A form of government.

**Sec. 17C. Four-year term for mayors in certain cities; acceptance by election; application of section.**

**Editor's note** – This section was not present herein as the city elected Sec. 17D, two-year term for mayors.

**Sec. 17D. Two-year term for mayors in cities under section 17C; acceptance by election.**

In any city in which the term of office of mayor is four years under the provisions of section seventeen C, upon the filing with the city clerk of a petition, which petition shall be subject to the provisions of section seven or section seven A of chapter fifty-three, signed by at least five per cent of the number of registered voters residing in said city at the last regular city election, the city clerk shall place upon the ballot for the next regular city election to be held not less than sixty days after the date of the filing of such petition the following question:

"Shall the term of office of mayor of the city of  
— be two years?"

YES. \_\_\_\_\_

NO. \_\_\_\_\_

If a majority of the votes cast in answer to said question is in the affirmative, the term of office of the mayor of said city shall thereafter be for two years and until the election and qualification of his successor, beginning with the next regular city election following the acceptance of this question.

(Acts of 1971, c. 311)

**Editor's note** – In a referendum held on November 6, 1973, the city voted to adopt a two-year term for mayors.

**Case law reference** – Procedures for referendum on question of two-year term of office for mayor under section 17C and section 17D of this chapter applicable to City of Fall River which had adopted a Plan A form of government, *Medeiros Board of Election Commissioners of Fall River*, 325, N.E. 2d 579, 367 Mass. 286 (1975).

**Sec. 18. Legislative powers, proceedings, city clerk, etc.**

Except as otherwise provided in this section, the legislative powers of the city council may be exercised as provided by ordinance or rule adopted by it.

1. *Quorum, etc.* – Every member of the council may vote on any question coming before it. A majority of the council shall constitute a quorum, and the affirmative vote of a majority of all the members of the council shall be necessary to adopt any motion, resolution or ordinance.
2. *Proceedings, etc.* – The city council shall, from time to time, establish rules for its proceedings. Regular and special meetings of the



council shall be held at a time and place fixed by ordinance. Except as otherwise authorized by section twenty-three A of Chapter thirty-nine, all sessions of the council shall be open to the public and to the press, and every matter coming before the council for action shall be put to a vote, the result of which shall be duly recorded. A full and accurate journal of the proceedings of the council shall be kept, and shall be open to the inspection of any registered voter of the city.

3. *City Clerk, Election, etc.* - The council shall, by a majority vote, elect a city clerk to hold office for three years and until his successor is qualified. He shall have such powers and perform such duties as the council may prescribe, in addition to such duties as may be prescribed by law. He shall keep the records of the meetings of the council.

*City Clerk to Hold Office Until Successor Is Qualified.* - The person holding the office of the city clerk at the time when any of the plans set forth in this chapter have been adopted by such city shall continue to hold office for the term for which he was elected and until his successor is qualified.

4. *City Auditor.* - The council in any city adopting Plan D or E shall, by a majority vote, elect a city auditor to hold office for three years and until his successor is qualified. He shall keep and have charge of the accounts of the city and from time to time audit the books and accounts of all departments, commissions, boards and offices of the city, and shall have such other powers and perform

such other duties as the council may prescribe, in addition to such duties as may be prescribed by law. (Acts of 1915, c. 267, I, § 18; Acts of 1938, c. 378 § 7; Acts of 1949, c. 723, § 1, Acts of 1958, c. 626, § 5)

#### **Sec. 19. Information by mayor or city manager to city council, attendance at meetings, etc.**

The city council at any time may request from the mayor, or, under Plan D or E, from the city manager, specific information on any municipal matter within its jurisdiction, and may request him to present to answer written questions relating thereto at a meeting to be held not earlier than one week from the date of the receipt by the mayor, or under Plan D or E, by the city manager, of said questions. The mayor, or, under Plan D or E, the city manager, shall personally, or through the head of a department or a member of a board, attend such meeting and publicly answer all such questions. The person so attending shall not be obliged to answer questions relating to any other matter. The mayor, or, under Plan D or E, the city manager, may attend and address the city council in person or through the head of a department, or a member of a board, upon any subject. (Acts of 1915, c. 257, I, § 19; Acts of 1938, c. 378, § 8; Acts of 1948, c. 459, § 6)

#### **Sec. 20. Ordinances, passage, etc.**

No ordinance shall be passed finally on the date on which it is introduced, except in cases of special emergency involved the health or safety of the people or their property.

No ordinance shall be regarded as an emergency measure unless the emergency is defined and declared in a preamble thereto separately voted on and receiving the affirmative vote of two thirds of the members of the city council.

No ordinance making a grant, renewal or extension, whatever its kind or nature, of any franchise or special privilege shall be passed as an emergency measure, and except as provided in sections seventy and seventy-one of chapter one hundred and sixty-four and in chapter one hundred and sixty-six, no such grant, renewal or extension shall be made otherwise than by ordinance.

(Acts of 1915, c. 267, I, § 20)

#### **Sec. 21. Amendments, etc.**

No ordinance shall be amended or repealed except by an ordinance adopted in accordance with this chapter.

(Acts of 1915, c. 267, I, § 21)

#### **Sec. 22. Passage at one session.**

Any ordinance, order or resolution may be passed through all its stages of legislation at one session, provided that no member of the council objects thereto; but if any member of the council objects, the measure shall be postponed for that meeting.

(Acts of 1915, c. 267, I, § 22)

#### **Sec. 23. Ordinances, etc., to be published.**

Every proposed ordinance or loan order, except emergency measures as hereinbefore defined and revenue loan orders, shall be published once in full in at least one newspaper of the city, and in any additional manner that may be provided by ordinance, at least ten days before its final passage. After such final passage it shall, in the same manner as before, again be published once, as amended and completed, except in the case of an emergency ordinance which may be passed as hereinbefore provided and which shall take effect on its passage, and shall be so published at the earliest practicable moment; provided, that if any ordinance or proposed ordinance, or codification of ordinances or proposed ordinances, shall exceed in length eight octavo pages of ordinary book print, then, in lieu of the advertising required by this section, the same may be published by the city council in a municipal bulletin or printed pamphlet, and if so published in full at least ten days before its final passage, and thereafter, as amended and completed, again published in such bulletin or pamphlet, said publications shall be deemed sufficient without the newspaper publication as herein required.

(Acts of 1915, c. 267, I, § 23; Acts of 1917, c. 162; Acts of 1935, c. 68, § 1)

#### **Sec. 24. Obligations, actions, legal acts, etc., to continue.**

All official bonds, recognizances, obligations, contracts and other instruments entered into or executed by or to the city before its adoption of a plan provided by



this chapter, and all taxes, special assessments, fines, penalties, forfeitures incurred or imposed, due or owing to the city, shall be enforced and collected, and all writs, prosecutions, actions and causes of action, except as herein otherwise provided, shall continue without abatement and remain unaffected by this chapter; and no legal act done by or in favor of the city shall be rendered invalid by its adoption of a plan provided by this chapter.

(Acts of 1915, c. 267, I, § 24)

**Sec. 25. Civil service laws not to apply to certain employees.**

The civil service laws shall not apply to the appointment of the mayor's secretaries or of the stenographers, clerks, telephone operators and messengers connected with his office, and the mayor may remove such appointees without a hearing and without making a statement of the cause of their removal.

(Acts of 1915, c. 267, I, § 25)

**Sec. 26. Certain vacancies, how filled; acting mayor.**

Except as otherwise provided in sections fifty A, fifty-nine A, eight-six, one hundred and two and one hundred and twenty-one, if a vacancy occurs in the office of the mayor or city council before the last six months of the term of office, the city council shall order an election for a mayor or a member of the council to serve for the unexpired term; and if such vacancy occurs in the office of mayor in the last six months of the term, the president of the city council shall succeed to said office for the

unexpired term. If the mayor is absent or unable from any cause temporarily to perform his duties they shall be performed by the president of the city council. The person upon whom such duties shall devolve shall be called "acting mayor," and he shall possess the powers of mayor only in matters not admitting of delay, but shall have no power to make permanent appointments.

Whenever, under Plan C, any councillor shall be temporarily unable for any cause to perform the duties of his office, the council may appoint one of its members to exercise his powers and perform his duties during such disability. Should an appointive officer of the city be temporarily unable for any cause to perform his duties, the council or the mayor, having the power of original appointment, may make a temporary appointment of some person to act until such official resumes his duties.

(Acts of 1915, c. 267, I, § 26; Acts of 1937, c. 224, § 1; Acts of 1938, c. 378, § 9; Acts of 1959, c. 448, § 9)

**Sec. 27. Officials and employees prohibited from making or sharing in contracts; penalty.**

Editor's note - Chapter 600 of the Acts of 1947 replaced this section of the Charter. The city then adopted M.G.L.A. c. 268, § 10, which was repealed by Acts of 1962, c. 779 and replaced by M.G.L.A., c. 268A, § 1 et seq.

**Sec. 28. Repealed.**

Editor's note - This section was repealed by Acts of 1984, c. 484, § 42.

**Sec. 29. Public contracts; form; required approvals; bond, etc.**

All contracts made by any department, board or commission where the amount involved is two thousand dollars or more shall be in writing, and no such contract shall be deemed to have been made or executed until the approval of the mayor under Plan A, B, C or F, or of the city manager under Plan D or E, and also of the officer or the head of the department or of the chairman of the board, as the case may be, making the contract is affixed thereto. Any contract made as aforesaid may be required to be accompanied by a bond with sureties satisfactory to the board or official having the matter in charge, or by a deposit of money, certified check or other security for the faithful performance thereof, and such bonds or other securities shall be deposited with the city treasurer until the contract has been carried out in all respects; and no such contract shall be altered except by a written agreement of the contractor, the sureties on his bond, if any, and the officer, department or board, as the case may be, making the contract, with the approval of the mayor under Plan A, B, C, D or F, or of the city manager under Plan E, affixed thereto. Any cash deposit or check payable to a city received as security for performance under this section may be deposited by said treasurer in any bank or trust company under a separate account to be known as a performance deposit account.

The provisions of this section shall be deemed to have been complied with on all purchases made under the provisions of sections twenty-two A and twenty-two B of chapter seven when one municipality acting on

behalf of other municipalities complies with the provisions of this section, or when purchases are made from a vendor holding a contract with the commonwealth for the item or items being purchased.

(Acts of 1915, c. 267, I, § 29; Acts of 1928, c. 300, § 2; Acts of 1938, c. 378, § 10; Acts of 1949, c. 723, § 2; Acts of 1951, c. 25, § 2; Acts of 1959, c. 448, § 10, approved Aug. 10, 1959; effective 90 days thereafter; Acts of 1973, c. 191; Acts of 1974, c. 199, § 3)

\* \* \*

out a hearing and without making a statement of the cause of the removal.

(Rev. Ords. 1966, § 2-1; Ord. No. 1983-7, 2-8-83)

**Charter reference** – Civil service laws shall not apply to certain employees in mayor's office, § 25.

**Cross reference** – Officers and employees, § 2-266 et seq.

**Sec. 2-148. City administrator.**

(a) There shall be an officer within the executive office of the mayor to be known as the city administrator.

(b) The city administrator shall be appointed by the mayor and shall be employed by contract. The city council shall approve the contract.

(c) The city administrator shall, under the direction of the mayor, assist the mayor in the administration of all affairs of the city that are placed in the mayor's charge by



the provisions of the city charter and ordinances, and by statutes of the commonwealth.

(d) The city administrator shall have the following minimum qualifications: either a bachelor's degree in business, political science, government, or related fields from an accredited institution and seven (7) years' experience in federal, state or local government; of which five (5) years were served in an administrative capacity; or a master's degree in public administration or related fields and five (5) years' experience in federal, state or local government, of which three (3) years were served in an administrative capacity. (Rev. Ords. 1966, § 2-1.1; Ord. No. 1983-7, 2-8-83; Ord. No. 1984-35, § 1, 9-25-84)

**Cross reference** – Officers and employees, § 2-266 et seq.

**Sec. 2-149. Director of management information services.**

(a) There shall be an officer within the office of the mayor to be known as the director of management information services.

(b) The director of management information services shall be appointed by the mayor and shall be employed by contract. The city council shall approve the contract.

(c) The director of management information services shall, under the direction of the city administrator, assist the city administrator with affairs of the city dealing with the management of information services. These include, but are not limited to, administration of the city's

data-processing and computer-related services, administration of printed communications services and telephonic communication services.

(Rev. Ords. 1966, § 2-1.2; Ord. No. 1986-38, § 1, 10-14-86)

**Cross reference** – Officers and employees, § 2-266 et seq.

**Secs. 2-150-2-165. Reserved.**

**ARTICLE IV. BOARDS, COMMITTEES, COMMISSIONS\***

**DIVISION 1. GENERALLY**

**Secs. 2-166-2-176. Reserved.**

**DIVISION 2. AIRPORT COMMISSION†**

**\*Charter references** – School committee, §§ 31-36; appointment of certain board members by the mayor, § 52; removal by mayor, § 54.

**Cross references** – Board of public works created, § 2-501 et seq.; civil defense advisory counsel, § 5-3; board of fire commissioners, § 6-31 et seq.; port authority, § 8-16 et seq.; board of health, § 9-31 et seq.; historical commission, § 10-16 et seq.; advisory housing commission, § 11-71 et seq.; board of appeals, § 11-86 et seq.; housing conversion board created, § 11-141; licensing board, § 12-21 et seq.; board of park commissioners, § 15-26 et seq.; personnel advisory board, § 16-31 et seq.; school committee, § 17-16 et seq.; library board of trustees, § 18-341 et seq.; City of Fall River Sewer Commission, § 19-26 et seq.; Watuppa Water Board, § 19-196 et seq.; board of appeals, § 21-36.

**†State law references** – Aircraft generally, M.G.L.A., c. 90, § 35 et seq.; authority of city to establish, maintain and operate airports and air navigation facilities, M.G.L.A.C. 90, § 51D; authority of city to establish airport commission, M.G.L.A., c.

**Sec. 2-177. Established; composition; appointment of members.**

There is hereby established in the city a commission of seven (7) members consisting of a chairman and six (6) associate members, citizens of the city, to be appointed by the mayor, approved by the council, and to be known as the Fall River Airport Commission.

(Rev. Ords. 1966, § 3-1)

**State law reference** – Similar provision, M.G.L.A., c. 90, § 51E.

**Sec. 2-178. Powers and duties generally.**

The airport commission shall have charge of the development and improvement of airport facilities for the city and may make such recommendations as it sees fit to the city council for the development of the present airport site now held by the city or for the acquiring of a new and different airport site.

(Rev. Ords. 1966, § 3-2)

**State law reference** – Powers and duties, M.G.L.A., c. 90, § 51F et seq.

**Sec. 2-179. Additional powers.**

The airport commission shall be granted whatever other powers that may be necessary, even though not

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90, § 51E; powers and duties of airport commission, M.G.L.A., c. 90, §§ 51E to 51L.

expressly designated herein, to carry out the purpose of this division.

(Rev. Ords. 1966, § 3-6)

**Sec. 2-180. Clerk and clerical assistance.**

(a) One (1) of the members shall annually be appointed clerk of the airport commission.

(b) The department of recreational facilities and cemeteries shall provide such administrative, clerical and management support as is requested by the airport commission. The commission shall reimburse the department of recreational facilities and cemeteries for such assistance.

(Rev. Ords. 1966, § 3-3; Ord. No. 1983-12, § 3, 5-17-83)

**Sec. 2-181. Expenditure of funds.**

The airport commission is authorized to spend whatever money is made available by the city council for airport purposes.

(Rev. Ords. 1966, § 3-4)

**Sec. 2-182. Promotion of air transport service; authority to enter into contracts.**

The airport commission shall use all means at its disposal for the purpose of promoting the introduction of air transport service into and out of the city and for that purpose is hereby authorized, subject to the approval of the mayor, to enter into any and all contracts with private



individuals and corporations that may be necessary for the establishment of such service in the city.

(Rev. Ords. 1966, § 3-5)

**State law references** - Disposition of revenue obtained by airport commission, M.G.L.A., c. 90, § 51I; contracts for establishment, etc., of municipal airports or other air navigation facilities, M.G.L.A., c. 90, § 51L.

**Secs. 2-183-2-193. Reserved.**

### DIVISION 3. BOARD OF ASSESSORS\*

#### **Sec. 2-194. Membership.**

The board of assessors shall consist of three (3) members appointed by the mayor.

#### **Sec. 2-195. Organization; quorum.**

The board of assessors shall annually, organize and choose from their number a chairman and secretary. A majority of the board shall be a quorum for the transaction of business.

(Rev. Ords. 1966, § 2-120)

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\***Charter reference** - Provisions regarding oaths of elected assessors, § 17.

**Cross reference** - Public property, § 2-746 et seq.

**State law references** - Assessors generally, M.G.L.A., c. 41, §§ 24-30A; assessment of local taxes generally, M.G.L.A., c. 59; duty to assess and manner of assessing taxes, M.G.L.A., c. 59, §§ 20-28.

#### **Sec. 2-196. In charge of assessing department; powers and duties generally.**

(a) The assessing department shall be under the charge of the board of assessors which shall have and exercise all the powers and duties, and be subject to all limitations, of assessors of property. In addition, the board of assessors shall have charge and custody of all of the real estate owned or acquired by the city as a result of foreclosure of tax titles, or which the city council may from time to time hereafter specifically commit to its care.

(b) The board of assessors may assign any of its powers or duties, with reference to such real estate in its care and custody, to any properly qualified employee of the assessing department. The powers and duties of the board of assessors, with

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### ARTICLE VI. DEPARTMENTS\*

#### DIVISION 1. GENERALLY

**Secs. 2-431-2-440. Reserved.**

#### DIVISION 2. DEPARTMENT OF HEALTH AND HUMAN SERVICES†

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\***Cross references** - Division of council on aging in the department of health and human services created, § 2-235; purchasing and contracting procedure, § 2-586 et seq.; purchasing department, § 2-596 et seq.; department of civil defense, § 5-1; fire department, § 6-16 et seq.; bureau of fire prevention, § 6-51 et seq.; division of public health created, § 9-16; traffic department, § 14-56 et seq.

†**Cross-references** - Division of the council on aging of the health and human services created, § 2-235; housing standards, § 11-36 et seq.

**Sec. 2-441. Created; administrator.**

There shall be a department of the city known as the department of health and human services. There shall be an administrator of health and human services who shall be appointed by the mayor and who shall have and exercise all the powers, rights and privileges required to supervise and control the department, except when specifically prohibited by state law.

(Ord. No. 1987-2, § 10E(13-1), 1-13-87)

**Sec. 2-442. Composition.**

The divisions of the department of health and human services are the division of administration, division of council on aging, division of code enforcement, division of public health, and a division of veteran's affairs.

(Ord. No. 1987-2, § 10E(13-1), 1-13-87; Ord. No. 1988-10, § 1, 2-23-88; Ord. No. 1988-25, § 5, 5-31-88)

**Sec. 2-443. Division directors, appointment.**

The directors of the divisions in the department of health and human services shall be appointed by the administrator of health and human services with the approval of the mayor, unless where specifically prohibited by state statute.

(Ord. No. 1987-2, § 10E(13-1), 1-13-87)

**Sec. 2-444. Director of code enforcement powers and duties generally.**

(a) The director of code enforcement shall also be designated inspector of buildings for the city and in his capacity as inspector of buildings, shall perform all repairs, alterations or additions upon all city buildings, including all buildings under the jurisdiction of the board of assessors, such repairs, alterations or additions to be performed in accordance with and subject to the provisions of this Revision and the general law. He shall also perform all other statutory duties as required by this designation.

(b) The director of code enforcement acting as building inspector will report to the administrator of health and human services. The director of code enforcement shall also exercise the powers and duties of inspector of wires as conferred under M.G.L.A., c. 166 and all others as conferred under chapter 7, as well as others which from time to time the mayor may direct.

(c) The director of code enforcement shall be designated as deputy health agent for the city.

(d) The director of code enforcement shall be appointed by the administrator of health and human services with the approval of the mayor and shall be subject to the administrative control, supervision and direction of the administrator, except when prohibited by state statute.

(Ord. No. 1987-2, § 10E(13-2), 1-13-87; Ord. No. 1988-25, § 5, 5-31-88)

**Cross reference** - Public property, § 2-746 et seq.



**Sec. 2-445. Division of code enforcement – In charge of construction of public buildings.**

The division of code enforcement shall have charge of the construction and maintenance of public buildings and related duties.

(Ord. No. 1987-2, § 10E(13-3), 1-13-87; Ord. No. 1988-25, § 5, 5-31-88)

**Sec. 2-446. Same – Superintending construction of city buildings; making repairs, alterations or additions.**

The division of code enforcement shall superintend the construction of all buildings erected by the city and shall perform all repairs, alterations or additions to all city buildings.

(Ord. No. 1987-2, § 10E(13-4), 1-13-87; Ord. No. 1988-25, § 5, 5-31-88)

**Sec. 2-447. Same – Care and custody of city buildings.**

The division of code enforcement shall have the care and custody of all city buildings used by the board of fire commissioners, the board of library trustees, the war veterans or their auxiliaries, and all other city buildings, except where other provision is made by law, and shall keep informed of their condition.

(Ord. No. 1987-2, § 10E(13-5), 1-13-87; Ord. No. 1988-25, § 5, 5-31-88)

**Sec. 2-448. Same – New buildings for use of other departments.**

It shall be the duty of the division of code enforcement to superintend the construction of all new buildings erected for the use of other departments, but no such new construction shall be started without first obtaining the approval of the appropriate board, commission, or department head to the plans and specifications relating to such proposed new building.

(Ord. No. 1987-2, § 10E(13-6), 1-13-87; Ord. No. 1988-25, § 5, 5-31-88)

**Sec. 2-449. Same – Competitive bids for repairs, alterations, or additions to public buildings.**

No repairs, alterations, or additions to any public building in the care or custody of the division of code enforcement shall be made without first advertising for competitive bids for the work to be done, as required by the ordinances of the city and as required by M.G.L.A., c. 43, § 28.

(Ord. No. 1987-2, § 10E(13-7), 1-13-87; Ord. No. 1988-25, § 5, 5-31-88)

**Sec. 2-450. Same – Employing architectural and engineering services.**

The division of code enforcement shall employ such architectural and engineering services necessary to perform the duties of the division as requested by the administrator of public works, the mayor, city council, the school committee, or by any board or officer in charge of a department of the city government.

(Ord. No. 1987-2, § 10E(13-8), 1-13-87; Ord. No. 1988-25, § 5, 5-31-88)

**Sec. 2-451. Reserved.**

**Editor's note** – Ord. No. 1988-25, § 6, adopted May 31, 1988, repealed provision formerly codified as § 2-451, relative to employment of certain tradesmen, which derived from Ord. No. 1987-2, § 10E(13-9), adopted Jan. 13, 1987.

**Sec. 2-452. Same – Record of city buildings; annual reports.**

The division of code enforcement shall keep an accurate record of all buildings belonging to the city which are in its charge and shall annually on or before the first Monday of February, submit to the administrator of health and human services, a written report showing their condition and the nature and amount of expenditures in detail made upon them for the year ending with the last day of December preceding. It shall also prepare as statement of the repairs which may be needed upon each building in the next twelve (12) months and the probable cost thereof.

(Ord. No. 1987-2, § 10E(13-10), 1-13-87; Ord. No. 1988-25, § 5-31-88)

**Sec. 2-453. Same – Establishment of standards and codes and inspections relative thereto.**

The division of code enforcement shall establish standards and codes for all construction or reconstruction

carried out within the city. It shall also conduct all inspection necessary to ascertain that its standards are met.

(Ord. No. 1987-2, § 10E(13-11), 1-13-87; Ord. No. 1988-25, § 5, 5-31-88)

**Sec. 2-454. Same – Enforcement of ordinances, etc., relative to buildings.**

The division of code enforcement shall enforce all ordinances, regulations and laws relating to buildings in the city, or the construction, alteration or repair thereof.

(Ord. No. 1987-2, § 10E(13-12), 1-13-87; Ord. No. 1988-25, § 5, 5-31-88)

**Sec. 2-455. Same – Inspection of building materials and examination of buildings generally.**

As often as is practicable, the division of code enforcement shall inspect the materials used in the construction or the repairing of any building. It shall also examine the construction of any building in the process of erection or repair and so far as necessary therefor may enter any building or premises. It shall examine all buildings which may be reported to it as in a dangerous or damaged condition by reason of fire, accident or other cause and shall make a record of such condition, together with the street and number of the building, the name of the owner or occupant and the purposes for which it was used. It shall examine all buildings concerning which application has been made for license to construct, enlarge, alter, repair or raze and shall make a record of such examination.



(Ord. No. 1987-2, § 10E(13-13), 1-13-87; Ord. No. 1988-25, § 5, 5-31-88)

**Sec. 2-456. Same – Employment of inspectors.**

The division of code enforcement shall employ inspectors in such numbers and of such expertise as to adequately conduct the business of the division in a good and timely fashion. There shall be an inspector of buildings and an inspector of wires and any others needed to properly enforce the provisions of section 11-36 et seq.

(Ord. No. 1987-2, § 10E(13-14), 1-13-87; Ord. No. 1988-25, § 5, 5-31-88)

**Secs. 2-457-2-470. Reserved.**

**DIVISION 3. POLICE DEPARTMENT\***

**Sec. 2-471. Police department alarm system.**

(a) The police department is hereby authorized to install, monitor and maintain a silent alarm system, providing silent or so-called holdup alarms to financial and mercantile institutions located in the city.

(b) The police department is further authorized to charge installation, monitoring and maintenance fees for

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\*Cross-reference – Police authorized to aid other cities in the event of riots, etc., § 5-4.

State law references – Police officers, M.G.L.A., c. 31, § 58 et seq.; municipal police officers generally, M.G.L.A., c. 41, § 96 et seq.; police generally, M.G.L.A., c. 147.

each such institution so connected at a rate agreed to by the participating business entities.

(c) The police department shall be permitted to add all such monies, so generated by providing this service, to its allotted annual budget as provided by the mayor and city council, for the sole purpose of acquiring needed material and resources to improve the delivery of public safety services to the community.

(Rev. Ords. 1966, § 2-118.1; Ord. No. 1982-28, 8-10-82)

**Cross reference** – Licenses, permits and business regulations, Ch. 12.

**Secs. 2-472-2-486. Reserved.**

**DIVISION 4. PUBLIC WORKS  
DEPARTMENT†**

*Subdivision A. Generally*

**Sec. 2-487. Created.**

There shall be a department of the city known as the department of public works.

(Rev. Ords. 1966, § 2-129; Ord. No. 1981-28, § 1(2-129), 9-1-81)

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†Cross references – Garbage, refuse and litter, Ch. 7; streets, sidewalks and other public places, Ch. 18; utilities, Ch. 19.

**Sec. 2-488. Divisions within the department enumerated.**

The divisions within the department of public works are the division of engineering, division of administrative services, division of solid waste operations, division of streets, yards and garages and division of municipal buildings.

(Rev. Ords. 1966, § 2-136; Ord. No. 1981-28, § 1(2-136), 9-1-81; Ord. No. 1987-2, § 10C(2-136), 1-13-87)

**Editor's note** – Pursuant to the adoption of § 6 of Ord. No. 1988-25, enacted May 31, 1988, the "division of municipal buildings" has been added to the enumeration of divisions within the department of public works. See Subdivision G of this division.

**Sec. 2-489. Persons in charge of divisions.**

Each division of the department of public works shall employ an individual who, under the immediate supervision of the administrator shall have charge of that division. The titles for each division and director shall be as follows:

- (1) Division of engineering; director of engineering (civil engineering);
- (2) Division of administrative services; director of administrative services;
- (3) Division of solid waste operations; director of solid waste operations;
- (4) Division of streets, yards and garages; director of streets, yards and garages.

(Rev. Ords. 1966, § 2-137; Ord. No. 1981-28, § 1(2-137), 9-1-81; Ord. No. 1983-8, § 2, 4-12-83; Ord. No. 1987-2, § 10C(2-137), 1-13-87)

**Secs. 2-490-2-500. Reserved.**

*Subdivision B. Board of Public Works\**

**Sec. 2-501. Appointment and removal.**

The appointment, terms of office and removal of the members of the board of public works shall be as provided by Acts of 1980, Chapter 207.

(Rev. Ords. 1966, § 2-129.1; Ord. No. 1981-28, § 1(2-129.1(III)), 9-1-81; Ord. No. 1987-2, § 10C(2-129.1(III)), 1-13-87)

**Sec. 2-502. Qualifications, compensation.**

The board of public works shall consist of three (3) citizens of the city who have been residents therein at least two (2) years immediately preceding the date of their appointment. Board members shall serve without compensation.

(Rev. Ords. 1966, § 2-129.1; Ord. No. 1981-28, § 1(2-129.1), 9-1-81; Ord. No. 1987-2, § 10C(2-129.1(III)), 1-13-87)

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\*Cross reference – Boards, committees, commissions, § 2-166 et seq.

State law reference – Board of public works, Acts of 1980, c. 207.



**Sec. 2-503. Powers, duties and responsibilities.**

The board of public works shall serve solely in an advisory capacity to the administrator of public works and shall organize itself as it deems appropriate for the purpose of discharging its advisory functions. The board is hereby limited to performing the advisory functions as listed below:

- (1) Advise the administrator of public works on contracted and/or technical services;
- (2) Assist the administrator of public works in developing a strategic planning process for department operations;
- (3) Assist the administrator of public works in formulating capital improvement programs;
- (4) Advise, upon request, the administrator of public works with regard to the awarding of contracts for the purchase of service and/or material;
- (5) Advise the mayor regarding the appointment of the administrator of public works.

(Rev. Ords. 1966, § 2-129.1; Ord. No. 1981-28, § 1(2-129.1(IV)), 9-1-81; Ord. No. 1987-2, § 10C(2-129.1(IV)), 1-13-87)

**Secs. 2-504-2-515. Reserved.***Subdivision C. Administrator of Public Works***Sec. 2-516. Established.**

There shall be an officer of the city known as the administrator of public works. The administrator of public works shall be responsible for the operation of the

department of public works and shall be considered a department head under M.G.L.A., c. 41, §§ 48-54A.

(Rev. Ords. 1966, § 2-129.2; Ord. No. 1981-28, § 1(2-130), 9-1-81; Ord. No. 1987-2, § 10C(2-129.2), 1-13-87)

**Sec. 2-517. Appointment.**

The mayor shall appoint the administrator of public works who shall be responsible for the operation of the department of public works.

(Rev. Ords. 1966, § 2-130; Ord. No. 1981-28, § 1(2-130), 9-1-81; Ord. No. 1987-2, § 10C(2-130), 1-13-87)

\* \* \*

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[LOGO] City of Fall River, Massachusetts

**CHARLOTTE L. KITCHEN**  
CLERK OF COMMITTEES

**RICHARD A. VASCONCELLOS**  
ASSISTANT CLERK OF COMMITTEE

March 1, 1991

Dear Councillor:

A meeting of the Committee on Ordinances has been scheduled for Tuesday, March 5, 1991 at 6:30 P.M. in the Council Chamber, Government Center to consider the following:

1. Misc. traffic ordinance
2. Handicapped Parking traffic ordinance
3. Proposed changes in city ordinances recommended by Personnel Director Sharon Skeels in her letter dated Feb. 21, 1991.

Your attendance at this meeting is respectfully requested.

Very truly yours,

/s/ Charlotte L. Kitchen  
Charlotte L. Kitchen  
Clerk of Committees

A TRUE COPY

ATTEST: /s/ Joseph F. Doran  
CITY CLERK

Committee Members:

M. Roderick, chr.  
S. Camara  
J. Mitchell  
L. Pelletier  
M. Plasski

## ORDINANCE MEETING

MEETING: Tuesday, March 5, 1991, 6:30 p.m.  
Council Chamber, Government Center

PRESENT: Councillor Camara, Pelletier and Plasski  
Councillor Roderick came in at 6:50 p.m.

ABSENT: Councillor J. Mitchell

IN ATTENDANCE: Charlene Simcock, Traffic Manager  
Robert Connors, City Administrator  
Sharon Skeels, Personnel Director

Councillor Steven Camara presided in the absence of Chairman Marilyn Roderick

After discussion on miscellaneous traffic ordinances a copy of which is attached it was voted to refer to full council for first reading, 3 yeas.

The proposed handicapped parking ordinance was discussed with Mrs. Simcock who explained that the proposed ordinance relative to Cherry Street contained an error and should not be considered at this time. The ordinance was then unanimously [sic] referred to full council to be passed with an emergency preamble through all four readings. City Councillor Roderick arrived and took over chairmanship of committee.

The Committee discussed the proposed ordinance relative to the Department of Health and Human Services with Personnel Director Sharon Skeels and City Administrator Robert Connors. Ms. Skeels told the Committee



that divisions presently under the Department of Health and Human Services would become departments with department heads reporting to the City Administrator and the Department of Heath [sic] and Human Services would be disbanded. The position of Administrator of Health and Human Services would be discontinued as of April 1, 1991 and it was stated that the present Administrator had been offered the position of Director of Public Health but had refused. It was voted unanimously to refer the ordinance to the full council for first reading (4 yeas), Councillor J. Mitchell absent.

On a motion made and seconded it was unanimously voted to adjourn.

/s/ Charlotte L. Kitchen  
Clerk of Committees

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[LOGO] *City of Fall River, Massachusetts*

DEPARTMENT OF PERSONNEL ADMINISTRATION  
CIVIL SERVICE • LABOR RELATIONS  
LOCATIONS • GROUP INSURANCE

DANIEL E. BOGAN  
MAYOR

SHARON M. SKEELS  
DIRECTOR OF PERSONNEL  
ADMINISTRATION

February 21, 1991

Honorable Daniel E. Bogan  
Mayor, City of Fall River  
One Government Center  
Fall River, MA 02722

Dear Mayor Bogan:

As directed by the City Administrator, I respectfully request your approval and recommendation to the City Council to revise certain section [sic] of the Ordinances of the City of Fall River to restructure the Health & Human Services Department as follows:

1. Delete the Health & Human Services Department as an entity.
2. Delete Division of Administration.
3. The following divisions of the former Health & Human Services Department shall revert to department status, with the department head reportable to the City Administrator:
  - a. Council on Aging
  - b. Veterans' Affairs
  - c. Public Health - to include the following inspectorial functions:

- 1) Minimum Housing
- 2) Sanitation
- 3) Food & Milk
- 4) Environment
- 5) Weights & Measures

d. Municipal Buildings and Code Enforcement

4. The Licensing Department shall fall under the Department of Personnel Administration for purposes of administrative support.
5. The title and salary of Administrator - Health & Human Services shall be deleted from the personnel ordinances, effective April 1, 1991.

Understanding that this recommendation is contrary to the 1985 recommendation to establish the Health & Human Services Department, we are not now saying that the concept was a failure. Rather, as we constantly fine-tune the way we deliver services to the public, we believe the above proposed configuration to be a more cost effective way of making City Government accessible to the people of our community.

Sincerely,

/s/ Sharon M. Skeels  
Sharon M. Skeels  
Director of Personnel

cc: Bob Connors, City Administrator

APPROVED

/s/ Daniel E. Bogan  
MAYOR

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[LOGO] *City of Fall River, Massachusetts*

EXECUTIVE DEPARTMENT

DANIEL E. BOGAN  
MAYOR

March 18, 1991

Honorable Joseph Doran, City Clerk  
City of Fall River  
One Government Center  
Fall River, MA 02722

Dear Mr. Doran:

As a result of information received from the state regarding cut backs in local aid for fiscal year 1992 which will affect the city's FY 1992 municipal budget, it has become necessary to reorganize the department of Health and Human Services.

To this end, I have requested that the Department of Health and Human Services and Administrator be eliminated. This action which will become effective April 1, 1991, will require terminating the incumbents employment.

Therefore, effective close of business Friday, March 29, 1991, the appointment of the following municipal official is hereby terminated:

Janet Scott-Harris, 450 Rock Street, Fall River, Massachusetts, as the Administrator, Health and Human Services.

I would like to express my appreciation for her service to the City of Fall River.



This action is not intended to reflect negatively upon her performance but is the result of continued reduction in state aid to the City of Fall River.

**A TRUE COPY**

**ATTEST:**

Very truly yours,

/s/ Daniel E. Bogan  
Daniel E. Bogan  
Mayor

/s/ Joseph F. Doran  
CITY CLERK  
April 28, 1994

DEB/omc  
CC: Janet Scott-Harris

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**City of Fall River, In City Council**

Be it ordained by the City Council of the City of Fall River, Massachusetts, that the Revised Ordinances of the City of Fall River, Massachusetts, 1988 be amended as follows:

Section 1: By striking out Section 2-235 in its entirety and inserting a new section as follows:

The Council on Aging shall be under the administration, control, supervision, and direction of the City Administrator, unless specifically prohibited by statute. The Council on Aging may appoint a director and such other employees as it may required in accordance with the general laws.

Section 2: By striking out therein:

Section 2-441  
Section 2-442  
Section 2-443  
Section 2-444

Section 3: By striking out in Section 2-401(b) the following words "health & human services" and inserting "public health".

Section 4: By striking out Section 2-416 in its entirety and inserting a new section as follows:

There shall be an official of the city known as the veteran's benefits agent and director of veteran's services whose duties it shall be to supervise and operate the veteran's benefits and veteran's services department. Said director shall be appointed by the mayor and shall be subject to the administrative control, supervision, and direction of the

city administrator. In accordance with the provisions of M.G.L.A., c. 115.

Section 5: By inserting therein the following new section 2-444:

Sec. 2-444 Department of Building Inspections – Powers and Duties Generally

(a) There shall be a department of buildings inspections under the control and jurisdiction of the director of building inspections.

(b) The director of building inspections shall be designated inspector of buildings for the city. He shall also perform all other statutory duties as required by this designation.

(c) The director of building inspections acting as building inspector will report to the City Administrator. The director of building inspections shall also exercise the powers and duties of inspector of wires as conferred under M.G.L.A., c. 166 and all others as conferred under chapter 7, as well as others which from time to time the mayor may direct.

(d) The director of building inspections shall be appointed by the Mayor and shall be subject to the administrative control, supervision and direction of the City Administrator, except when prohibited by state statute.

Section 6: By striking out therein Sections 2-445 – 2-451.

Section 7: By inserting therein the following new sections:

Section 2-490 In charge of construction of public buildings.

The department of public works shall have charge of the construction and maintenance of public buildings and related duties.

Section 2-491 Superintending construction of city buildings; making repairs, alterations or additions.

The department of public works shall superintend the construction of all buildings erected by the city and shall perform all repairs, alterations, or additions to all city buildings, including all buildings under the jurisdiction of the board of assessors, such repairs, alterations, and additions to be performed in accordance with and subject to the provisions of this revision and the general law.

Section 2-492 Care and custody of city buildings.

The department of public works shall have the care and custody of all city buildings used by the board of fire commissioners, the board of library trustees, the war veterans or their auxiliaries, and all other city buildings, except where other provision is made by law, and shall keep informed of their condition.

Section 2-493 New buildings for use of other departments.



It shall be the duty of the department of public works to superintend the construction of all new buildings erected for the use of other departments, but no such new construction shall be started without first obtaining the approval of the appropriate board, commission, or department head to the plans and specifications relating to such proposed new building.

Section 2-494 Competitive bids for repairs, alterations, or additions to public buildings.

No repairs, alterations, or additions to any public building in the care or custody of the department of public works shall be made without first advertising for competitive bids for the work to be done, as required by the ordinances of the city and as required by M.G.L.A., c. 43, 28.

Section 2-495 Employing architectural and engineering services.

The department of public works shall employ such architectural and engineering services necessary to perform the duties of the division as requested by the administrator of public works, the mayor, city council, the school committee, or by any board or officer in charge of a department of the city government [sic].

Section 2-496 Employment of carpenters, mechanics, custodians and subordinates.

The department of public works shall employ carpenters, custodians, mechanics

and subordinates who shall render such services as may be required in the performance of the duties of the division.

Section 2-497 Record of city buildings; annual reports.

The deparment [sic] of public works shall keep an accurate record of all buildings belonging to the city which are in its charge and shall annually on or before the first Monday of February, submit to the city administrator a written report showing their condition and the nature and amount of expenditures in detail made upon them for the year ending with last day of December preceding. It shall also prepare as statement of the repairs which may be needed upon each building in the next twelve (12) months and the probable cost thereof.

Section 9: By striking out the following in Sections 2-453 through 2-456 the words "division of municipal buildings and code enforcement" and inserting "department of building inspections".

Section 10: By striking out therein Section 9-16.

Section 11: By striking out Section 9-36 in its entirety and inserting a new section 9-36 as follows:

The director of public health shall execute the administrative policy of the board of health as administrative health agent. The director of public health/health agent shall be responsible for carrying out operational policy of the board of health as defined in M.G.L.A., Chapter 111.

Section 12: By striking out the following in Section 9-41 the words "director of municipal buildings and code enforcement/deputy health agent" and inserting "department of public works", also striking the word "his" and inserting "its".

Section 13: By striking out the following in Section 9-66 (c) in its entirety and inserting a new section 9-66 (c) as follows:

(c) The inspector shall be within the department of public health.

Section 14: By striking out the following in Section 9-81 in its entirety and inserting a new section 9-81 as follows.

Enforcement of the provisions of this division shall be through the director of public health/health agent.

Section 15: By striking out the following in Section 9-82 the words "municipal buildings and code enforcement" and inserting "public health", also striking the word "deputy" after the words capacity as.

Section 16: By striking out the following in Sections 9-129(a)&(b) - 9-130 the words "administrator of health and human services" and inserting "director of public health".

Section 17: By striking out the title of Subdivision B, under Division 2 (Administration) to read as follows:

Subdivision B. Department of Building Inspections

Section 18: By striking out therein Sections 11-51 and 11-52, and by inserting therein the following new sections.

#### Sec. 11-51. Enforcement Agency

(a) There is hereby created a division of minimum housing within the department of public health for the purpose of enforcing the provisions of this article and such other matters as may be appropriately assigned to it.

(b) The personnel of the division of minimum housing building inspections shall consist of a director of municipal buildings and code enforcement herein after referred to in this article as director and such other inspectors, clerks and other personnel as may be required for the proper organization of the division and for the proper enforcement of this article.

Sec. 11-52. Administration by director ; appointment, qualifications [sic], etc; delegation of powers.

The division of minimum [sic] housing inspections shall be operated under the immediate direction, supervision and control of a director appointed by the board of health. The director may delegate any of his powers or duties under the provisions of this article to any properly qualified employee of the department.

Section 19: By striking out the following in Section 11-54 (b) the words "department of municipal buildings and code enforcement within



the department of health and human services" and inserting "division of Minimum housing".

- Section 20: By striking out the following in Section 12-29 the words "health and human services" and inserting "personnel administration".
- Section 21: By striking out the following in Section 16-216 relating to personnel the words "Administrator of health and human services . . . 16-239" and "Deputy Commissioner of Public Works and Inspector of Buildings/Director of Municipal Buildings and Code Enforcement Inspector of Buildings . . . 16-239" and adding in proper alphabetical order: "Deputy Commissioner of Public Works and Inspector of Buildings/Director of Building Inspections . . . 16-239."
- Section 22: By striking out the following in Section 16-239 the words "Administrator of Health and Human Services" and "Deputy Commissioner of Public Works and Inspector of Buildings/Director of Municipal Buildings and Code Enforcement - Inspector of Buildings".
- Section 23: By striking the following in Section 16-239 the words "Deputy Commissioner of Public Works and Inspector of Buildings/Director of Municipal Buildings and Code enforcement" and inserting "Deputy Commissioner of Public Works and Inspector of Buildings/Director of Building Inspections."

This ordinance to become effective April 1, 1991.

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO: 91-12057-PBS

JANET SCOTT-HARRIS,

PLAINTIFF,

vs.

CITY OF FALL RIVER, DANIEL  
BOGAN ROBERT L. CONNORS,  
and MARILYN RODERICK,

DEFENDANTS.

**MOTION OF THE DEFENDANT, CITY OF  
FALL RIVER, FOR A DIRECTED VERDICT  
PRESENTED AT THE CLOSE OF THE  
PLAINTIFF'S OPENING STATEMENT**

The City of Fall River moves that the Court direct a verdict in its favor following the plaintiff's opening statement.

The plaintiff's complaint against the City of Fall River is that it, through its final decision makers, the Mayor and City Council, eliminated the position she filled thereby ending her employment because she is black or because she exercised her right to freedom of speech.

To effect elimination of the position the plaintiff held an amendment to city ordinances was required. Such an amendment was proposed by the mayor and adopted by the City Council on a 6-2 vote.

On these points there is no dispute.

The plaintiff, through her opening statement, at most, says she will offer evidence from which a jury could conclude that mayor Bogan's motivation was her free speech or race and that council member Roderick voted for the amendment motivated by plaintiff's race or free speech.

The plaintiff clearly does not intend to offer evidence that the motivation of a majority of the members of the City Council [was race or the plaintiff's exercise of the speech] in voting to adopt the amendment.

The elimination of the position the plaintiff filled could only be effected by joint action of the mayor and a majority of the City Council.

Without evidence that a majority of the members of the City Council were motivated to vote in favor of the ordinance amendment by race or free speech the plaintiff cannot as a matter of law satisfy her burden of proof against the City of Fall River.

Respectfully submitted,

/s/ Stephen C. Fulton  
 Stephen C. Fulton  
 Attorney for City  
 of Fall River  
 Long, Racicot & Bourgeois  
 200 State Street  
 Boston, MA 02109  
 617-439-4777  
 BBO # 181420

c:/SCF/02495

[5/16/94 Denied.  
 Patti B. Saris]

UNITED STATES DISTRICT COURT  
 FOR THE  
 DISTRICT OF MASSACHUSETTS

JANET SCOTT-HARRIS	) NO. 91-12057-PBS
Plaintiff	)
V.	)
CITY OF FALL RIVER, DANIEL	)
BOGAN, ROBERT L. CONNORS,	)
and MARILYN RODERICK,	)
Defendants	)

**MOTION OF THE DEFENDANT, CITY OF FALL  
 RIVER FOR A DIRECTED VERDICT  
 PURSUANT TO F.R.C.P. 50(a).**

The defendant, City of Fall River, moves that the Court enter a directed verdict on the plaintiff's complaint pursuant to F.R.C.P. 50(a) for the following specific reasons:

1. As to so much of Count I as alleges a violation of 42 U.S.C. 1983 (claims based upon 42 U.S.C. 1981 have been voluntarily dismissed)
  - a) there is insufficient evidence upon which a jury would be warranted in finding that the plaintiff has established there was discrimination so as to require the defendant to offer a non-discriminatory justification for the elimination of the position she held.
  - b) there is insufficient evidence upon which a jury would be warranted in



finding that the legitimate and non-discriminatory reason or reasons given by The City of Fall River to justify elimination of the position of Administrator, Health & Human Services was a pretext.

- c] there is insufficient evidence upon which a jury would be warranted in finding that the decision of the Mayor of the City of Fall River to recommend an amendment to the city ordinances which would eliminate the position of Administrator, Health & Human Services was made because the plaintiff who occupied that position was black and with an intent to eliminate the plaintiff from that position because she is black.
- d] there is insufficient evidence upon which a jury would be warranted in finding that the votes of a majority of the City Council of the City of Fall River voting to adopt an amendment to city ordinances which eliminated the position of Administrator, Health & Human Services were made because the plaintiff who occupied that position was black and with an intent to eliminate the plaintiff from that position because she is black.
- e] there is insufficient evidence upon which a jury would be warranted in finding that the elimination of the position of Administrator, Health & Human Services on the Mayor's [sic] proposal and on approval by the votes of a majority of the City Council was a proximate

cause of compensable injury or damages to the plaintiff.

2. As to Count II:

- a] there is insufficient evidence upon which a jury would be warranted in finding that the making or expression of any constitutionally protected statements by the plaintiff was a substantial or motivating factor for the decision of the Mayor of the City of Fall River to recommend an amendment to city ordinances which would eliminate the position of Administrator, Health & Human Services.
- b] there is insufficient evidence upon which a jury would be warranted in finding that the making or expression of any constitutionally protected statements by the plaintiff was a substantial or motivating factor for the votes of a majority of the City Council of the City of Fall River voting to adopt an amendment to the ordinances of that city so as to eliminate the position of Administrator, Health & Human Services.
- c] there is insufficient evidence upon which a jury would be warranted in finding that the elimination of the position of Administrator, Health & Human Services, would not have occurred but for the protected speech of the plaintiff.
- d] there is insufficient evidence upon which a jury would be warranted in finding that the elimination of the position of Administrator, Health & Human

Services on the Mayor's proposal and on approval by the votes of the majority of the City Council was a proximate cause of compensable injury or damages to the plaintiff.

3. Count III has been waived.
4. Count IV has been waived or dismissed.

By its attorney,

/s/ Stephen C. Fulton  
 STEPHEN C. FULTON  
 Long, Racicot &  
 Bourgeois  
 200 State Street  
 Boston, MA 02109  
 Tel. (617) 439-4777

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UNITED STATES DISTRICT COURT  
 FOR THE DISTRICT OF MASSACHUSETTS

JANET SCOTT-HARRIS, )

Plaintiff )

C.A. NO. 91-12057

VS. )

CITY OF FALL RIVER, )  
 MASSACHUSETTS; DANIEL )  
 E. BOGAN, individually and )  
 in his former official capacity )  
 as Mayor of Fall River, )  
 Massachusetts; ROBERT L. )  
 CONNORS, individually and )  
 in his official capacity as City )  
 Administrator; MARILYN )  
 RODERICK, individually and )  
 in her official capacity as a )  
 member of the Fall River City )  
 Council; )

Defendants )

**MOTION OF THE DEFENDANTS, ROBERT L.  
 CONNORS AND MARILYN RODERICK FOR A  
 DIRECTED VERDICT PURSUANT TO F.R.C.P. 50 (a)**

The defendants, Robert L. Connors and Marilyn Roderick move that the Court enter a directed verdict on the plaintiff's complaint pursuant to F.R.C.P. 50(a) for the following specific reasons:

1. As to so much of Counts I as alleges a violation of 42 U.S.C. 1983 (claims based upon 42 U.S.C. 1981 have been voluntarily dismissed)



- a) there is insufficient evidence upon which a jury would be warranted in finding that Robert L. Connors was a proximate cause of the injuries allegedly sustained by the Plaintiff.
- b) there is insufficient evidence upon which a jury would be warranted in finding that Marilyn Roderick was a proximate cause of the injuries allegedly sustained by the Plaintiff.
- c) there is insufficient evidence upon which a jury would be warranted in finding that the vote of Marilyn Roderick to amend city ordinances so as to eliminate the position of Administrator, Health & Human Services was made because the plaintiff who occupied that position was black and with the intent to eliminate the plaintiff from that position because she is black.
- d) there is insufficient evidence upon which a jury would be warranted in finding that the legitimate and non-discriminatory reason or reasons given by Marilyn Roderick to justify elimination of the position of Administrator, Health & Human Services was a pretext.
- e) there is insufficient evidence upon which a jury would be warranted in finding that the true reason the position of Administrator, Health & Human Services was eliminated was that the plaintiff was black.
- f) there is insufficient evidence upon which a jury would be warranted in

finding that the elimination of the position of Administrator, Health & Human Services was a proximate cause of injury or damages to the plaintiff.

- g) there is insufficient evidence upon which a jury would be warranted in finding that the plaintiff suffered any compensable damages as a result of any violation by Robert L. Connors or Marilyn Roderick of rights guaranteed by the Fourteenth Amendment to the United States Constitution.

2. As to Count II:

- a) there is insufficient evidence upon which a jury would be warranted in finding that the making or expression of any constitutionally protected statements by the plaintiff was a substantial or motivating factor for the decision of Marilyn Roderick to vote to amend the city ordinances so as to eliminate the position of Administrator, Health & Human Services.
- b) there is insufficient evidence upon which a jury would be warranted in finding that the elimination of the position of Administrator, Health & Human Services, would not have occurred but for the protected speech of the plaintiff.
- c) there is insufficient evidence upon which a jury would be warranted in finding that the elimination of the position of Administrator, Health & Human Services was a proximate cause of injury or damages to the plaintiff.

- d) there is insufficient evidence upon which a jury would be warranted in finding that the plaintiff suffered any compensable damages as a result of any violation by Robert L. Connors or Marilyn Roderick of rights guaranteed by the First Amendment to the United States Constitution.

Respectfully submitted,

/s/ Bruce A. Assad  
 Bruce A. Assad,  
 Esquire  
 P.O. Box 1268  
 Fall River, MA  
 02722-1268  
 (508) 673-2004

DATED: May 16, 1994

[5/16/94 Denied with  
 respect to Ms.  
 Roderick. Allowed  
 with respect to Mr.  
 Connors for the rea-  
 sons stated in court.  
 Patti B. Saris]

UNITED STATES DISTRICT COURT  
 DISTRICT OF MASSACHUSETTS

JANET SCOTT-HARRIS,

Plaintiff,

v.

CITY OF FALL RIVER,  
 MASSACHUSETTS; DANIEL E.  
 BOGAN, Individually, MARILYN  
 RODERICK, Individually,

Defendants.

CIVIL ACTION  
 NO. 91-12057-PBS

SPECIAL VERDICT FORM

Saris, U.S.D.J.

CITY OF FALL RIVER

1. Has Ms. Scott-Harris proven that the reason given by the City of Fall River for the elimination of the position of Administrator, Health and Human Services, was not the true reason?

\_\_\_\_\_ yes \_\_\_\_\_ no

[Answer Question 2 if you answered Question 1 yes.  
 Answer Question 3 if you answered Question 1 no].

2. Has Ms. Scott-Harris proven that the real reason of the City of Fall River for the elimination of the position



of Administrator, Health and Human Services, was intentional racial discrimination?

\_\_\_\_\_ yes \_\_\_\_\_ no

[Answer Question 3 if you answered Question 2 yes or no].

3. Has Ms. Scott-Harris proven that her protected speech was a substantial or motivating factor in the City's decision to eliminate the position of Administrator, Health and Human Services?

\_\_\_\_\_ yes \_\_\_\_\_ no

[Answer Question 4 if you answered Question or [sic] 2 or 3 yes. Sign and date the verdict form if you answered both questions no].

4. Has Ms. Scott-Harris proven that the elimination of her position by the City of Fall River proximately caused her any injuries?

\_\_\_\_\_ yes \_\_\_\_\_ no

[Answer Questions 5 and 6 if you answered Question 4 yes. Otherwise, sign and date the verdict form].

#### MARILYN RODERICK

5. Has Ms. Scott-Harris proven that Councilwoman Marilyn Roderick voted to approve an amendment of city ordinances which would have the effect of eliminating the position of Administrator, Health and Human Services with the intent to terminate plaintiff's employment because she is black?

\_\_\_\_\_ yes \_\_\_\_\_ no

6. Has Ms. Scott-Harris proven that her constitutionally protected speech was a substantial or motivating factor in the vote of Fall River City Councilwoman Marilyn Roderick favoring amendment of city ordinances which would have the effect of eliminating the position of Administrator, Health and Human Services?

\_\_\_\_\_ yes \_\_\_\_\_ no

[Answer Question 7 if you answered Question 5 or 6 yes. Otherwise, proceed to Question 8].

7. Has Ms. Scott-Harris proven that the act of Councilwoman Marilyn Roderick in voting favorably toward the amendments was a proximate cause of the elimination of the position?

\_\_\_\_\_ yes \_\_\_\_\_ no

[Answer Questions 8 and 9]

#### DANIEL BOGAN

8. Has Ms. Scott-Harris proven that Mayor Bogan recommended an amendment to city ordinances which would have the effect of eliminating the position of Administrator, Health and Human Services, with the intent to terminate the plaintiff's employment because she is black?

\_\_\_\_\_ yes \_\_\_\_\_ no

9. Has Ms. Scott-Harris proven her constitutionally protected speech was a substantial or motivating factor in the recommendation by Daniel Bogan, then Mayor, of the amendment of city ordinances which would have the

effect of eliminating the position of Administrator, Health and Human Services?

\_\_\_\_\_ yes \_\_\_\_\_ no

[Answer Question 10 if you answered Question 8 or 9 yes. Proceed to Question 11 if you answered yes to Question 4 or 7. Otherwise, proceed to the end of the verdict slip].

10. If you answered yes to Questions 8 or 9, do you find that the act of Mr. Bogan in recommending the amendment was the proximate cause of the elimination of the position?

\_\_\_\_\_ yes \_\_\_\_\_ no

[If you answered Question 4, 7, or 10 yes, proceed to Question 11. Otherwise, proceed to the end of the verdict slip].

### DAMAGES

#### Compensatory

11. If you answered Questions 4, 7, or 10 yes, what amount of money will fairly compensate Ms. Scott-Harris for her injuries?

\$ \_\_\_\_\_

\$ \_\_\_\_\_  
(words)

#### Punitive

12. If you answered Question 7 yes, has Ms. Scott-Harris proven that Ms. Roderick acted maliciously or

with reckless indifference to her rights for which punitive damages are warranted?

\_\_\_\_\_ yes \_\_\_\_\_ no

13. If so, what amount of punitive damages do you award?

\$ \_\_\_\_\_

\$ \_\_\_\_\_  
(words)

14. If you answered Question 10 yes, has Ms. Scott-Harris proven that Mr. Bogan acted maliciously or with reckless indifference to her rights for which punitive damages are warranted?

\_\_\_\_\_ yes \_\_\_\_\_ no

15. If so, what amount of punitive damages do you award?

\$ \_\_\_\_\_

\$ \_\_\_\_\_  
(words)

I certify that the jurors unanimously concur in the above decision.

\_\_\_\_\_  
FOREPERSON

Date:

\_\_\_\_\_



[Has she proven by preponderance of evidence that her position was eliminated due to race?]

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

JANET SCOTT-HARRIS, ) [Original 3:55 PM  
Plaintiff, ) Verdict 5/26/94]  
v. ) CIVIL ACTION  
CITY OF FALL RIVER, ) NO. 91-12057-PBS  
MASSACHUSETTS; DANIEL E. )  
BOGAN, Individually, MARILYN )  
RODERICK, Individually, )  
Defendants. )

SPECIAL VERDICT FORM

Saris, U.S.D.J.

[Mayor and majority of  
City Councilors (Final Policy Makers)]

CITY OF FALL RIVER

1. Has Ms. Scott-Harris proven that the reason given by the City of Fall River for the elimination of the position of Administrator, Health and Human Services, was not the true reason?

\_\_\_\_\_ yes ☒ no

[Answer Question 2 if you answered Question 1 yes.  
Answer Question 3 if you answered Question 1 no].

2. Has Ms. Scott-Harris proven that the real reason of the City of Fall River for the elimination of the position

of Administrator, Health and Human Services, was intentional racial discrimination?

\_\_\_\_\_ yes ☒ no

[Answer Question 3 if you answered Question 2 yes or no].

3. Has Ms. Scott-Harris proven that her protected speech was a substantial or motivating factor in the City's decision to eliminate the position of Administrator, Health and Human Services?

☒ yes \_\_\_\_\_ no

[Answer Question 4 if you answered Question 2 or 3 yes. Sign and date the verdict form if you answered both questions no].

4. Has Ms. Scott-Harris proven that the elimination of her position by the City of Fall River proximately caused her any injuries?

☒ yes \_\_\_\_\_ no

[Answer Questions 5 and 6 if you answered Question 4 yes. Otherwise, sign and date the verdict form].

MARILYN RODERICK

5. Has Ms. Scott-Harris proven that Councilwoman Marilyn Roderick voted to approve an amendment of city ordinances which would have the effect of eliminating the position of Administrator, Health and Human Services with the intent to terminate plaintiff's employment because she is black?

\_\_\_\_\_ yes ☒ no

6. Has Ms. Scott-Harris proven that her constitutionally protected speech was a substantial or motivating factor in the vote of Fall River City Councilwoman Marilyn Roderick favoring amendment of city ordinances which would have the effect of eliminating the position of Administrator, Health and Human Services?

☒ yes ☐ no

[Answer Question 7 if you answered Question 5 or 6 yes. Otherwise, proceed to Question 8].

7. Has Ms. Scott-Harris proven that the act of Councilwoman Marilyn Roderick in voting favorably toward the amendments was a proximate cause of the elimination of the position?

☒ yes ☐ no

[Answer Questions 8 and 9]

#### DANIEL BOGAN

8. Has Ms. Scott-Harris proven that Mayor Bogan recommended an amendment to city ordinances which would have the effect of eliminating the position of Administrator, Health and Human Services, with the intent to terminate the plaintiff's employment because she is black?

☐ yes ☒ no

9. Has Ms. Scott-Harris proven her constitutionally protected speech was a substantial or motivating factor in the recommendation by Daniel Bogan, then Mayor, of the amendment of city ordinances which would have the

effect of eliminating the position of Administrator, Health and Human Services?

☒ yes ☐ no

[Answer Question 10 if you answered Question 8 or 9 yes. Proceed to Question 11 if you answered yes to Question 4 or 7. Otherwise, proceed to the end of the verdict slip].

10. If you answered yes to Questions 8 or 9, do you find that the act of Mr. Bogan in recommending the amendment was the proximate cause of the elimination of the position?

☒ yes ☐ no

[If you answered Question 4, 7, or 10 yes, proceed to Question 11. Otherwise, proceed to the end of the verdict slip].

#### DAMAGES

##### Compensatory

11. If you answered Questions 4, 7, or 10 yes, what amount of money will fairly compensate Ms. Scott-Harris for her injuries?

\$ 156,000.00

\$ One hundred fifty six  
thousand dollars  
(words)

**Punitive:** [Exemplary damages – not against the city only the individuals. Punish a defendant for his or her actions or to deter others!]



12. If you answered Question 7 yes, has Ms. Scott-Harris proven that Ms. Roderick acted maliciously or with reckless indifference to her rights for which punitive damages are warranted?

✓ yes             no

13. If so, what amount of punitive damages do you award?

\$ 15,000.00

\$ Fifteen thousand dollars  
(words)

14. If you answered Question 10 yes, has Ms. Scott-Harris proven that Mr. Bogan acted maliciously or with reckless indifference to her rights for which punitive damages are warranted?

✓ yes             no

15. If so, what amount of punitive damages do you award?

\$ 60,000.00

\$ Sixty thousand dollars  
(words)

I certify that the jurors unanimously concur in the above decision.

James F. McManus  
FOREPERSON

Date: 5/26/94

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5/26/94

Judge Saris,

On this revised form why is the instructions regarding question 2, crossed out with your initials?

Jim McManus

Could you please send up the tape?

J.Mc.

According to your instructions and answers to our questions yesterday, we are confused as to why we cannot decide differently on 1 & 3?

They were seperated [sic] in the charges!

J.Mc.

---

5/26/94

You must decide whether plaintiff has proven that her protected speech was a substantial or motivating factor in the city's decision to eliminate the position of administrator of Health and Human Services.

If the budget was the substantial motivating factor in the decision to eliminate the position, you must answer Q 1 no. If you answer no, go no further. ~~and the court will~~ Sign and date the form.

If speech was the substantial motivating factor in the decision, you must answer Q. 1 yes. Then proceed to Q. 2 and the remainder of the verdict form.

Patti B. Saris  
5:10 pm

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

JANET SCOTT-HARRIS,

Plaintiff,

v.

CITY OF FALL RIVER,  
MASSACHUSETTS; DANIEL E.  
BOGAN, Individually, MARILYN  
RODERICK, Individually,

Defendants.

) [Filed in court 5/26/94  
) at 5:20 P.M. HMC]

) CIVIL ACTION  
) NO. 91-12057-PBS

[REVISED]

SPECIAL VERDICT FORM

Saris, U.S.D.J.

CITY OF FALL RIVER

1. Has Ms. Scott-Harris proven that the reason given by the City of Fall River for the elimination of the position of Administrator, Health and Human Services, was not the true reason?

☒ yes ☐ no

~~[Answer Question 2 if you answered Question 1 yes.  
Answer Question 3 if you answered Question 1 no].~~

2. Has Ms. Scott-Harris proven that the real reason of the City of Fall River for the elimination of the position



of Administrator, Health and Human Services, was intentional racial discrimination?

\_\_\_\_\_ yes      ☒ no

[Answer Question 3 if you answered Question 2 yes or no].

3. Has Ms. Scott-Harris proven that her protected speech was a substantial or motivating factor in the City's decision to eliminate the position of Administrator, Health and Human Services?

☒ yes      \_\_\_\_\_ no

[Answer Question 4 if you answered Question 2 or 3 yes. Sign and date the verdict form if you answered both questions no].

4. Has Ms. Scott-Harris proven that the elimination of her position by the City of Fall River proximately caused her any injuries?

☒ yes      \_\_\_\_\_ no

[Answer Questions 5 and 6 if you answered Question 4 yes. Otherwise, sign and date the verdict form].

#### MARILYN RODERICK

5. Has Ms. Scott-Harris proven that Councilwoman Marilyn Roderick voted to approve an amendment of city ordinances which would have the effect of eliminating the position of Administrator, Health and Human Services with the intent to terminate plaintiff's employment because she is black?

\_\_\_\_\_ yes      ☒ no

6. Has Ms. Scott-Harris proven that her constitutionally protected speech was a substantial or motivating factor in the vote of Fall River City Councilwoman Marilyn Roderick favoring amendment of city ordinances which would have the effect of eliminating the position of Administrator, Health and Human Services?

☒ yes      \_\_\_\_\_ no

[Answer Question 7 if you answered Question 5 or 6 yes. Otherwise, proceed to Question 8].

7. Has Ms. Scott-Harris proven that the act of Councilwoman Marilyn Roderick in voting favorably toward the amendments was a proximate cause of the elimination of the position?

☒ yes      \_\_\_\_\_ no

[Answer Questions 8 and 9].

#### DANIEL BOGAN

8. Has Ms. Scott-Harris proven that Mayor Bogan recommended an amendment to city ordinances which would have the effect of eliminating the position of Administrator, Health and Human Services, with the intent to terminate the plaintiff's employment because she is black?

\_\_\_\_\_ yes      ☒ no

9. Has Ms. Scott-Harris proven her constitutionally protected speech was a substantial or motivating factor in the recommendation by Daniel Bogan, then Mayor, of the amendment of city ordinances which would have the

effect of eliminating the position of Administrator, Health and Human Services?

☒ yes ☐ no

[Answer Question 10 if you answered Question 8 or 9 yes. Proceed to Question 11 if you answered yes to Question 4 or 7. Otherwise, proceed to the end of the verdict slip].

10. If you answered yes to Questions 8 or 9, do you find that the act of Mr. Bogan in recommending the amendment was the proximate cause of the elimination of the position?

☒ yes ☐ no

[If you answered Question 4, 7, or 10 yes, proceed to Question 11. Otherwise, proceed to the end of the verdict slip].

### DAMAGES

#### Compensatory

11. If you answered Questions 4, 7, or 10 yes, what amount of money will fairly compensate Ms. Scott-Harris for her injuries?

\$ 156,000.00  
\$ One hundred fifty six  
thousand dollars  
(words)

#### Punitive

12. If you answered Question 7 yes, has Ms. Scott-Harris proven that Ms. Roderick acted maliciously or

with reckless indifference to her rights for which punitive damages are warranted?

☒ yes ☐ no

13. If so, what amount of punitive damages do you award?

\$ 15,000.00  
\$ Fifteen thousand dollars  
(words)

14. If you answered Question 10 yes, has Ms. Scott-Harris proven that Mr. Bogan acted maliciously or with reckless indifference to her rights for which punitive damages are warranted?

☒ yes ☐ no

15. If so, what amount of punitive damages do you award?

\$ 60,000.00  
\$ Sixty thousand dollars  
(words)

I certify that the jurors unanimously concur in the above decision.

James F. McManus  
FOREPERSON

Date: 5/26/94

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UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS  
CIVIL COURTNOTE FORM

Case No. CA 91-12057-PBS

Date: see below

JANET SCOTT-HARRIS

V.

CITY OF FALL RIVER, ET AL.

JUDGE: Saris CLERK: Whitney

REPORTER: see below

for PLAINTIFF(s): Schwartz, Sweeney

for DEFENDANT(s): Marchand, Assad, Fulton

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CLERK NOTES:

05/17/94: JURY TRIAL, DAY TWO. Note from juror advising of inadvertent contact w/witness in elevator. Counsel advised. No action taken. Note filed (attached).

05/25/94: JURY TRIAL, DAY EIGHT. Deliberations begin.

Question 1 rec'd 12:00 p.m. Responses iescribed [sic] by Judge after consultation w/counsel, and question is ret'd to jury. Jury instructed not to dispose of question as it will be filed and made part of record.

Question 2 rec'd 2:00 p.m. Response enscribed by Judge after consultation w/counsel, and question ret'd to jury. Same instruction.

Question 3 rec'd 2:20 p.m. Response read in Court after consultation w/counsel. Reporter: M. Cloonan.

5:00 p.m. ADJOURNED until 9:00 a.m. 05/26/94.

05/26/94: JURY TRIAL, DAY NINE. Deliberations resume.

Question 4 rec'd 10:30 a.m. Response enscribed by Judge after consultation w/counsel. Question ret'd to jury w/instruction not to dispose of it.

3:55 p.m. Verdict reached. Reporter: M. Cloonan. Verdict form improperly filled out (see ORIGINAL VERDICT form, 3:55 p.m., 05/26/94 attached). Jury sent back to deliberate after curative instruction given.

Question 5 rec'd 4:30 p.m. Response enscribed by Judge after consultation w/counsel and ret'd to jury.

5:20 p.m. Jury returns verdict. Jury finds for plaintiff on Count Two of the complaint. Jury awards compensatory damages in the amount of \$156,000.00. Punitive damages awarded against dft Roderick in the amount of \$15,000.00 and against dft Bogan in the amount of \$60,000.00. Verdict recorded. REVISED VERDICT FORM filed. Jury discharged.

Sidebar w/counsel: Pltf's mtn w/supporting aff on attys fees due 06/03/94, response 06/10/94. JUDGMENT will then be entered, w/post-trial motions t/b/f/thereafter. Dfts orally renew motion for mistrial; DENIED.

Original (for docketing)/Clerk's Copy

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UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

JANET SCOTT-HARRIS,

Plaintiff,

CIVIL ACTION  
NO. 91-12057-PBS

v.

CITY OF FALL RIVER,  
DANIEL E. BOGAN, and  
MARILYN RODERICK,

Defendants.

ORDER OF JUDGMENT

SARIS, D.J.

June 3, 1994

This action came before the Court for a trial by jury. The issues have been tried, and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED:

JUDGMENT for the plaintiff, Janet Scott-Harris, on Count Two of the complaint. Compensatory damages are awarded in the amount of One Hundred Fifty-Six Thousand Dollars (\$156,000.00). Punitive damages are awarded against defendant Marilyn Roderick in the amount of Fifteen Thousand Dollars (\$15,000.00) and against defendant Daniel E. Bogan in the amount of Sixty Thousand Dollars (\$60,000.00).

By the Court,

/s/ Deborah L. Whitney [SEAL]  
Deputy Clerk

[The Current Interest rate is 5.02% per annum.]

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

JANET SCOTT-HARRIS,

Plaintiff

C.A. NO.  
91-12057-PBS

VS.

CITY OF FALL RIVER,  
MASSACHUSETTS; DANIEL E.  
BOGAN, Individually, MARILYN  
RODERICK, individually,

Defendants

MOTION OF THE DEFENDANT CITY OF FALL RIVER  
FOR JUDGMENT NOTWITHSTANDING THE VERDICT  
PURSUANT TO FED. R. CIV P. 50(b)

The defendant, City of Fall River, moves that judgment be entered in its behalf on Count II of the plaintiff's complaint notwithstanding the verdict pursuant to Fed. R. Civ. P. 50(b) on the grounds set forth in its motions for directed verdict made at trial.

A memorandum in support of this motion is served and filed herewith.

By its attorney,

/s/ Stephen C. Fulton/EB  
Stephen C. Fulton  
Long, Racicot & Bourgeois  
200 State St.  
Boston, Ma. 02109  
617-439-4777



[Saris, DJ] 1/30/95 DENIED for the reasons stated in the Court's Memorandum dated 1/27/95.

By the Court: Deborah L. Whitney -  
Clerk.]

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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

C.A. NO. 91-12057

JANET SCOTT-HARRIS,

Plaintiff

VS.

CITY OF FALL RIVER,  
MASSACHUSETTS; DANIEL E.  
BOGAN, individually, MARILYN  
RODERICK, individually

Defendants

**MOTION OF THE DEFENDANT, MARILYN  
RODERICK FOR JUDGMENT NOTWITHSTANDING  
THE VERDICT PURSUANT TO F.R.C.P. 50 (b)**

The defendant, Marilyn Roderick, moves that judgment be entered in her behalf on Count II of the Plaintiff's Complaint notwithstanding the verdict pursuant to Fed. R. Civ. P. 50 (b) on the grounds set forth in her motions for directed verdict made at trial and on the grounds that Marilyn Roderick is entitled to absolute immunity.

A memorandum in support of this motion is served and filed herewith.

Respectfully submitted,

/s/ Bruce A. Assad  
Bruce A. Assad, Esquire  
10 Purchase Street  
P.O. Box 1268  
Fall River, MA 02722-1268  
(508) 673-2004

DATED: June 15, 1994

[*Saris, DJ* 1/30/95 DENIED for the reasons stated in the Court's Memorandum dated 1/27/95.

By the Court: Deborah L. Whitney  
Clerk.]

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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

C.A. NO. 91-12057-PBS

\*\*\*\*\*

JANET SCOTT-HARRIS,

Plaintiff

VS.

CITY OF FALL RIVER,  
MASSACHUSETTS, DANIEL E.  
BOGAN, Individually, MARILYN  
RODERICK, Individually,

Defendants

\*\*\*\*\*

**MOTION OF THE DEFENDANT, DANIEL BOGAN  
FOR JUDGMENT NOTWITHSTANDING THE  
VERDICT PURSUANT TO FED. R. CIV. P. 50(b)**

The Defendant, Daniel Bogan, moves that judgment be entered in his behalf on Count II of the Plaintiff's complaint notwithstanding the verdict pursuant to Fed. R. Civ. P. 50(b) on the grounds set forth in its motions for directed verdict made at trial.



A memorandum in support of this motion is served and filed herewith.

DATED: June 16, 1994

By his attorney,  
DANIEL E. BOGAN, Defendant,

/s/ Robert J. Marchand  
Robert J. Marchand, Esquire  
DRISCOLL, MARCHAND  
& BOYER  
206 Winter Street,  
P.O. Box 2527  
Fall River, MA 02722  
(508)672-8652

[Saris, D] 1/30/95 DENIED for the reasons stated in the Court's Memorandum dated 1/27/95.

By the Court: Deborah L. Whitney  
Clerk.]

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

JANET SCOTT-HARRIS,  
Plaintiff

v.

CITY OF FALL RIVER,  
MARILYN RODERICK, and  
DANIEL BOGAN,  
Defendants

CIVIL ACTION NO.  
91-12057-PBS

MEMORANDUM AND ORDER

August 11, 1995

SARIS, U.S.D.J.

INTRODUCTION

This case arises out of a May 26, 1994, jury verdict in favor of the plaintiff Janet Scott-Harris against defendants City of Fall River ("the City"), City Councilor Marilyn Roderick ("Roderick"), and former Mayor Daniel E. Bogan ("Bogan"). Having missed the deadline for filing an appeal, the defendants move for an order: (1) to reopen the time for appeal pursuant to Fed. R. App. P. 4(a)(6); (2) to confirm that the Court would treat the plaintiff's Motion for Attorneys Fees as a Motion to Alter or Amend the Judgment; (3) to vacate any final judgment and order with respect to plaintiff's motion for attorney's fees pursuant to Fed. R. Civ. P. 60(b)(6) and reenter the same; and (4) to enter an amended judgment pursuant to

Fed. R. Civ. P. 58 and to provide notice of that entry pursuant to Fed. R. Civ. P. 77.

After hearing, the Court **ALLOWS** the motions to reopen the time for appeal pursuant to Fed. R. App. 4(a)(6) (Docket Nos. 113, 117, and 120). The remaining motions (Docket Nos. 110, 111, 112, 116, and 119) are **DENIED**.

#### FACTUAL BACKGROUND

On May 26, 1994, a federal jury found that plaintiff Janet Scott-Harris' protected speech was a substantial or motivating factor in the defendants' elimination, by ordinance, of her position as Administrator of the Department of Health and Human Services. Accordingly, the jury found defendant City liable under 42 U.S.C. § 1983 for compensatory damages in the amount of \$156,000, and defendants Bogan and Roderick liable for punitive damages in the amount of \$60,000 and \$15,000, respectively. The Court entered judgment in accordance with the jury verdict on June 6, 1994.

Following the unfavorable verdict, all three defendants filed motions for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(b), and for a new trial pursuant to Fed. R. Civ. P. 59. Plaintiff filed several motions for attorney's fees and costs.

The Court held a hearing on the defendants' post-trial motions on September 29, 1994. After taking the matter under advisement at the conclusion of the hearing, the court held an unrecorded sidebar conference to discuss settlement. At the end of the settlement conference,

the subject of the plaintiff's pending Motions for Attorney's Fees came up.<sup>1</sup> Defendants had filed no written opposition to plaintiff's motions. Although confirming that fees were unopposed, defense counsel requested that the Court postpone the award of attorney's fees pending a decision on their post-trial motions. The Court agreed.

While memories differ on the precise language used by the Court and counsel, all counsel agree that this court did not enter any order pursuant to Fed. R. App. P. 4(a)(4)(D) or Fed. R. Civ. P. 58 to extend the time of the appeal period. All counsel also agree that the Court made no representations as to the time limit for filing an appeal, and indeed that the subject of appeal was never discussed. However, it is also undisputed that *all* defense attorneys involved in the case departed from the sidebar with the mistaken understanding that judgment in the case was not "final" until the Court ruled on the post-trial Rule 50 and Rule 59 motions and, if denied, until judgment was amended to include the attorney's fees. Accordingly, they did not understand that pursuant to Fed. R. Civ. P. 54 and 58, as amended effective December 1, 1993, unless otherwise ordered, the court enters a *separate* judgment on attorney's fees. Fed. R. Civ. P. 58 provides:

Subject to the provisions of Rule 54(b): (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum

<sup>1</sup> Plaintiff filed her initial motion for attorneys' fees on June 6, 1994. Two supplemental motions were later filed. Plaintiff filed a third supplemental motion for attorney's fees on June 1, 1995, which the Court subsequently denied.



certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court; (2) . . . *Entry of judgment shall not be delayed, nor the time for appeal extended, in order to tax costs or award fees*, except that, when a timely motion for attorneys' fees is made under Rule 54(d)(2), the court, before a notice of appeal has been filed and has become effective, may order that the motion have the same effect under Rule 4(a)(4) of the Federal Rules of Appellate Procedure as a timely motion under Rule 59. . . .

Fed. R. Civ. P. 58. (Emphasis added). Thus, when the Court agreed not to award attorney's fees until after ruling on the post-trial motions, counsel construed that as meaning that "judgment" would not be final until the Court entered judgment on the attorney's fees.

Hearing that the attorney's fees were unopposed, the Court clerk endorsed an order allowing plaintiff's unopposed motions for attorney's fees on September 29, 1994 – the day of defendants' post-trial motions hearing. In accordance with the Court's understanding of defense counsel's request, the Court did not order entry of judgment on the attorney's fees pursuant to Fed. R. Civ. P. 58 because of the pending motions pursuant to Fed. R. Civ. P. 59. On October 7, 1994, the ruling on attorney's fees was entered on the docket. The defense attorneys did not get a copy of this Court's marginal annotation allowing plaintiff's motion for attorney's fees as unopposed until April 7, 1995, when plaintiff's attorney faxed them the demand letter along with a copy of its attorney's fees motion which contained the margin order.

On January 27, 1995, the Court denied the defendants' post-trial motions. That order was entered upon the docket on January 30, 1995. Due to a clerical error by the Court staff, a copy of the memorandum and order denying the post-trial motions was mailed to only two of the attorneys. While the docket reflects that the clerk's office sent a copy of the memorandum and order to the City's attorney, Stephen Fulton ("Fulton"), it was returned by the Post Office for lack of a forwarding address. The docket clerk had apparently mailed it to the wrong address. According to Fulton, it was never remailed, and the docket is unclear as to remailing. Bogan's attorney, Robert Marchand ("Marchand") did not receive notice of the judgment from the Court until subsequent to February 22, 1995. The docket clerk never sent Roderick's attorney, Bruce Assad ("Assad"), a copy of the decision.

Despite the clerical glitches, all counsel learned of the court's order because of press coverage by February 1, 1995. On January 31, 1995, a news reporter had informed attorney Assad that the Court had denied the defendants' post-trial motions and forwarded him a copy of the Court's memorandum which Assad received on or about February 1, 1995. The same day Assad learned of the decision from the news reporter, he telephoned attorney Fulton to inform him that a decision on the motions had been reached. As a result, Fulton went to the clerk's office on February 1, 1995, and picked up a copy of the memorandum and order on the defendants' post-trial motions. As with the other copies of the memorandum and order, the date of entry was not indicated on the face of the memorandum and order.

By February 6, 1995,<sup>2</sup> all defense attorneys received a copy of the plaintiff's letter to the Court from plaintiff's counsel indicating that the Court had rendered a decision on the defendants' motions, but that a decision on the attorney's fees remained outstanding. The plaintiff's letter to the Court stated, in pertinent part:

I received the Court's memorandum and Order on the defendants' motion for J.N.O.V.. The only remaining issue *before judgment can be entered* is the plaintiff's unopposed motion for attorney's fees.

(Emphasis added). Plaintiff wrote this letter in good faith, not to mislead defense counsel. This letter reflects the misunderstanding all attorneys continued to have about the event which would trigger the appeal period.

On February 24, 1995, Fulton telephoned the docket clerk and asked whether there was a ruling on the plaintiff's attorney's fees, or any final judgment entered on the docket. According to Fulton's affidavit, "[h]er response was that there was no such ruling and that *the only ruling on the docket was denial of the defendants' motions for judgment.*" (Emphasis added). The docket clerk has no memory of that conversation. However, because Fulton, as well as Assad and Marchand, believed that judgment was not final until the Court entered an order amending the judgment on attorney's fees, they did not file an appeal. Fulton called again during the week of March 13 and got a similar status report.

<sup>2</sup> Assad, Marchand, and Fulton received copies of the plaintiff's letter on February 2, 4, and 6, respectively.

On April 7, 1995, the defendants received a demand for satisfaction of judgment from the plaintiff's attorney. The demand notified the defendants that judgment was final, and that the appeal period had expired. On April 11, 1995, the defendants filed the four motions which are the subject of this memorandum.

### DISCUSSION

#### 1. The Procedural Framework.

Federal Rule of Appellate Procedure 4(a)(1) requires notice of appeal to "be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from. . . ." Fed. R. App. P. 4(a)(1). The timely filing of a notice of appeal is mandatory and jurisdictional. *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 315, 108 S. Ct. 2405, 2408 (1988); *see also Air Line Pilots Ass'n v. Precision Valley Aviation, Inc.*, 26 F.3d 220, 223 (1st Cir. 1994); *Feinstein v. Moses*, 951 F.2d 16, 19 (1st Cir. 1991); *In re O.P.M. Leasing Services, Inc.*, 769 F.2d 911, 916 (2d Cir. 1985).

In *Budinich v. Becton Dickinson and Co.*, 486 U.S. 196, 108 S. Ct. 1717 (1988), the Supreme Court enunciated a bright-line rule for the commencement of the appeal period: the appellate period begins once a final decision on the merits is reached, irrespective of a claim for attorney's fees. 486 U.S. at 202-3, 108 S. Ct. at 1722. In affirming the denial of the appeal as untimely, the Court reasoned that unless a claim for attorney's fees goes to the merits of the case itself, it is a collateral issue and thus does not toll the appeal period. *Id.* at 200, 108 S. Ct. at



1721 ("As a general matter, at least, we think it is indisputable that a claim for attorney's fees is not part of the merits of the action to which the fees pertain.").

In the wake of *Budinich*, the procedural rules were amended to reflect the Supreme Court's decision. Rule 58 of the Federal Rules of Civil Procedure provides that the appeal period shall not be extended, in the absence of a specific court order, in order to award attorney's fees pursuant to Fed. R. Civ. P. 54(d)(2). Under Rule 58, a motion for attorney's fees extends the appeal period only upon a court order "that the [attorney's fees] motion have the same effect under Rule 4(a)(4) of the Federal Rules of Appellate Procedure as a timely motion under Rule 59."<sup>3</sup> Fed. R. Civ. P. 58. While recognizing that "[o]rdinarily the pendency or post-judgment filing of a claim for attorney's fees will not affect the time for appeal from the underlying judgment," the Advisory Committee Notes to the 1993 Amendment of Rule 58 make clear that courts have discretion to delay the finality of judgment under Fed. R. App. P. 4(a) when there is a dispute over fees. Thus,

to accomplish this result requires entry of an order by the district court *before* the time a notice of appeal becomes effective for appellate purposes. If the order is entered, the motion for

<sup>3</sup> Rule 59(e), governing motions to alter or amend judgment, provides district courts with the authority "to rectify its own mistakes in the period immediately following the entry of judgment." *White v. New Hampshire Dep't of Employment Security*, 455 U.S. 445, 450, 102 S. Ct. 1162, 1165-66 (1982); see also Fed. R. Civ. P. 59, Notes of Advisory Committee on Rules, 1946 Amendment to Subdivision (e).

attorney's fees is treated in the same manner as a timely motion under Rule 59.

Fed. R. Civ. P. 58, Notes of Advisory Committee, 1993 Amendment (Emphasis added).

Likewise, Rule 4(a)(4) excludes motions for attorney's fees from those which extend the timetable for filing an appeal unless "a district court under Rule 58 extends the time for appeal." Fed. R. App. P. 4(a)(4)(D) (Emphasis added). The 1993 amendment to Fed. R. App. P. 4(a)(4) was intended to conform to the bright-line rule set forth in *Budinich* regarding the commencement of the appeal period. Fed. R. App. P. 4(a)(4), Notes of the Advisory Committee, 1993 amendment.

Fed. R. Civ. P. 54(d)(2)(c) provides that claims for attorney's fees shall be made by motion, and after they are determined by the court, "a judgment shall be set forth in a separate document as provided in Rule 58." The notes of the Advisory Committee to the 1993 Amendment state: "Fee awards should be made in the form of a separate judgment under Rule 58 since such awards are subject to review in the court of appeals."

Once the district court issues an order or judgment, Rule 77(d) of the Federal Rules of Civil Procedure requires the clerk of the court to serve notice of entry of an order or judgment "immediately" upon its entry. Yet, the Rule specifically provides that:

[l]ack of notice of entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in

### Rule 4(a) of the Federal Rules of Appellate Procedure.

Fed. R. Civ. P. 77(d). Thus, while Rule 77(d) imposes on parties the duty to inquire periodically into the litigation's status and to ascertain when the court enters an order that they wish to protest, Rule 4(a) of the Federal Rules of Appellate Procedure provides authority for the Court to "ease strict sanctions now imposed on appellants whose notices of appeal are filed late because of their failure to receive notice of entry of judgment." Notes of Advisory Committee, 1991 Amendment. See *Latham v. Wells Fargo Bank, N.A.*, 987 F.2d 1199, 1202 (5th Cir. 1993) (Fed. R. App. P. 4(a) provides an exception to Fed. R. Civ. P. 77(d)); *In re O.P.M. Leasing Services, Inc.*, 769 F.2d 911, 917 (2d Cir. 1985) (pre-4(a)(6) decision construing Fed. R. Civ. P. 77 as imposing duty on counsel to discern status of litigation).

### 2. Reopening the Appeal Period.

The Court's denial of the defendants' post-trial motions was entered on January 30, 1995. The defendants failed to file a notice of appeal by the March 1, 1995 deadline. Unless this case falls within one of the exceptions to the requirements of Rule 4(a)(1), the appeal is untimely. The defendants contend that the Court has discretion to reopen the appeal period pursuant to Fed. R. App. P. 4(a)(6).

Rule 4(a)(6) authorizes an extension of the appeal period when the appellant fails to receive notice of the entry of judgment or order within 21 days of its entry. See

*Avolio v. County of Suffolk*, 29 F.3d 50, 52 (2d Cir. 1994) (describing Fed. R. App. P. 4(a)(6)). In such instances,

the district court may, upon motion filed within 180 days of entry of the judgment or order or within 7 days of receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.

Fed. R. App. P. 4(a)(6); see also *Zimmer St. Louis, Inc. v. Zimmer Co.*, 32 F.3d 357, 360 (8th Cir. 1994) (discussing Fed. R. App. P. 4(a)(6)); *Vahan v. Shalala*, 30 F.3d 102, 103 (9th Cir. 1994) (dismissing appeal because motion was not filed within seven days of receiving actual notice of the judgment as required by Rule 4(a)(6)). The 1991 amendment to Rule 4(a)(6) provides "a limited opportunity for relief in circumstances where the notice of entry of a judgment or order, required to be mailed by the clerk pursuant to [Fed. R. Civ. P. 77(d)], is either not received by a party or is received so late as to impair the opportunity to file a timely notice of appeal." Notes of the Advisory Committee on Appellate Rules, 1991 Amendment. The rule contemplates receipt of notice of the entry of the judgment, not merely receipt of the judgment. See *Virella-Nieves v. Briggs & Stratton Corp.*, 53 F.3d 451, 453 (1st Cir. 1995) (distinguishing notice of order from notice of its entry); *Avolio v. County of Suffolk*, 29 F.3d at 53 (notice of entry of judgment "from the clerk or any party" must be written notice).

Relief under Fed. R. App. P. 4(a)(6) is discretionary. See *In the Matter of Jones*, 970 F.2d 36, 39 (5th Cir. 1992). The Ninth Circuit has placed limits on the discretion afforded district courts. See *Nunley v. City of Los Angeles*,



52 F.3d 792, 798 (9th Cir. 1995). In *Nunley*, the court acknowledged that Rule 4(a)(6) provides some discretion to district courts, but held that "where non-receipt has been proven and no other party would be prejudiced, the denial of relief cannot rest on a party's failure to learn independently of the entry of judgment during the thirty-day period for filing notices of appeal." *Id.* at 789.

### 3. Sufficiency of Oral Notification of Entry.

The circuits split as to whether oral notification of entry suffices under Rule 4(a)(6). Compare *Avolio v. County of Suffolk*, 29 F.3d at 53 (Rule 4(a)(6) contemplates written notice: "an oral communication simply is not sufficient to trigger the relevant time periods") and *Vahan v. Shalala*, 30 F.3d at 103 (recognizing that despite earlier oral notification, notice effective when appellant received written copy of judgment) with *Zimmer St. Louis, Inc. v. Zimmer Co.*, 32 F.3d 357 (8th Cir. 1994) (appellant received notice of order denying post-trial motions, which was the trigger for appeal period, through a discussion with the judge's clerk).

Here, the defendants, as parties to this action, were entitled to written notice of the entry of the order denying their post-trial motions, which initiated the period for appeal. See Fed. R. App. P. 4(a)(4). Nevertheless, the defendants failed to receive notice of its entry within the 21-day period. Fed. R. App. P. 4(a)(6). The plaintiff argues that since all counsel knew that the post-trial motions were denied by February 1, 1995, they fall outside the rule's scope. However, the Court's memorandum and order did not indicate its date of entry on the docket. See

*Virella-Nieves v. Briggs & Stratton Corp.*, 53 F.3d 451, 453 (1st Cir. 1995) (distinguishing notice of order from notice of its entry); *Avolio v. County of Suffolk*, 29 F.3d at 53 (notice of entry is the starting point).

Attorney Fulton received oral notice that the order was entered on February 24, 1995, but the record is unclear whether he passed on this information to other counsel who all worked as a close team throughout this litigation. However, even if Fulton did not inform Marchand and Assad that the orders denying the post-trial motions had been entered, it was inexcusable neglect not to check themselves. See *Virella-Nieves v. Briggs & Stratton Corp.*, 53 F.3d at 453-54 (no excusable neglect found where party were on notice that dispositive orders had been signed but failed to inquire when the orders were docketed within reasonable time); *In re O.P.M. Leasing Services, Inc.*, 769 F.2d 911, 918 (2d Cir. 1985) (no excusable neglect found where appellant did not receive notice of entry of judgment or a copy of the court's opinion and overlooked report of decision published in a law journal); *Fase v. Seafarers Welfare and Pension Plan*, 574 F.2d 72, 77 (2d Cir. 1978) (no excusable neglect found where parties received copies of court's memorandum opinion and order but failed to inquire as to the deadline for appeal). Accordingly, all counsel had oral or constructive notice of entry of the orders.<sup>4</sup>

<sup>4</sup> In urging the Court to decline exercising its discretion under Fed. R. App. P. 4(a)(6), plaintiff argues that defendants' failure to ascertain the date of entry of the order does not constitute "excusable neglect."

At least by April 7, 1995, all defendants received plaintiff's demand letter seeking satisfaction of the judgment. This letter constitutes actual written notice of the entry of the judgment by a party. The Advisory Committee notes to the 1991 Amendments to Fed. R. Civ. P. 77(d) state: "The effect of the revisions is to place a burden on prevailing parties who desire certainty that the time for appeal is running." Because this Court agrees with the *Avolio* court that only written notice of the entry of judgment is sufficient to trigger the seven day timetable to reopen the appeal period, defendants' Rule 4(a)(6) motions filed on April 11, 1995, four days after plaintiff's letter, are timely.

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Plaintiff improperly reads Fed. R. App. P. 4(a)(5)'s excusable neglect standard into subsection (6). See *Nunley v. City of Los Angeles*, 52 F.3d at 798 (concept of excusable neglect does not apply to Rule 4(a)(6)); *Avolio v. County of Suffolk*, 29 F.3d 50, 54 (2d Cir. 1994) (court cannot deny relief under Rule 4(a)(6) based inexcusable neglect for not having learned of the entry of judgment). In *Virella-Nieves v. Briggs & Stratton Corp.*, 53 F.3d 451, the First Circuit reviewed whether the defendants were entitled to an extension to file notices of appeal under subdivision (a)(5) where they had received a copy of the order, but no indication that the order had been entered upon the docket. In noting that the defendants had been placed on notice that the dispositive orders had been signed, but had chosen to wait 27 days before trying to ascertain whether the orders had been entered, the court found no excusable neglect. However, the Court noted that 4(a)(6) "may supply an alternate basis for the district court to grant defendants additional time to appeal." *Id.* at 454.

#### 4. Exercise of Discretion.

The Court will exercise its discretion under Fed. R. Civ. P. 4(a)(6) to allow defendants' motion to reopen the appeal period for the following reasons. First, the case involves significant issues involving the quantum of proof necessary to impose municipal liability for employment decisions made by a legislative entity like a city council, and the applicability of the doctrine of legislative immunity under Section 1983. The stakes are high. Punitive damages have been awarded against elected officials, a former mayor and vice-chair of the city council, for violations of the civil rights of the first African-American to be hired by the City of Fall River in a management position. It is in the interests of justice not to preclude appellate rights in this case.

Second, defense counsel Fulton did check with the clerk's office to learn the status of the judgment to make sure his appeal was timely, but did so under a misapprehension of law that the judgment was not "final" until it included attorney's fees. Generally this error of law would not persuade me to exercise my discretion to allow the re-opening of the appeal period. The law has been clear since the *Budinich* opinion in 1988 – and any ambiguities have been clarified by the 1991 and 1993 amendments to the rules – that a motion for attorney's fees does not toll the appeal period. Nonetheless, counsel left the unrecorded sidebar conference with a misunderstanding of what the court meant when attorneys fees were discussed. This good faith misunderstanding cuts against harsh sanctions for the legal error.



Third, plaintiff concedes she has not been substantially prejudiced, and the Court appreciates her candor in her affidavit as well as her frustration at these prolonged proceedings.

Fourth, the court staff made clerical errors in failing to mail certain rulings to counsel, and the docket clerk, who was new on the job, may have unintentionally provided information to counsel which confirmed their misimpression that judgment was not final until it included attorney's fees.

#### 5. Post-Script.

The Court cannot resist pointing out that regardless of the merits of the action and appeal, the City of Fall River did not show similar largesse to Ms. Scott-Harris when she sought to continue employment with the City, and when she attempted to retract a letter of resignation which had mistakenly been sent out by a secretary. Had defendants not held to the technicalities and exercised their discretion more justly, they might not be before the Court now.

#### ORDER

For the foregoing reasons, the Court **ALLOWS** defendants' motions to reopen the time for appeal pursuant to Fed. R. App. P. 4(a)(6) (Docket Nos. 113, 117, and 120).

The Court **DENIES** the defendants' motions (1) to confirm that plaintiff's motions for attorney's fees were to be treated as a motion to alter or amend (Docket No. 110); (2) to vacate any final judgment and order with

respect to plaintiff's motion for attorney's fees pursuant to Fed. R. Civ. P. 60(b)(6) and reenter the same (Docket Nos. 112, 116, and 119); and (3) to enter an amended judgment pursuant to Fed. R. Civ. P. 58 and provide notice of that entry pursuant to Fed. R. Civ. P. 77 (Docket No. 111).

This Order was entered on August 14, 1995.

/s/ Patti B. Saris  
PATTI B. SARIS  
United States  
District Judge

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UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

JANET SCOTT-HARRIS,

Plaintiff,

CIVIL ACTION  
NO. 91-12057-PBS

v.

CITY OF FALL RIVER,  
DANIEL E. BOGAN, and  
MARILYN RODERICK,

Defendants.

JUDGMENT ON ATTORNEYS FEES

SARIS, D.J.

August 14, 1995

Pursuant to Fed. R. Civ. P. 54(d)(2)(C) and 58, and the Court's endorsements granting #79, motion of plaintiff for attorneys fees and costs in the amount \$79,229.45; granting #81, supplemental motion of plaintiff for attorneys fees in the amount of \$1,206.25; and granting #97, second supplemental motion of plaintiff for attorneys fees in the amount \$2,744.00, IT IS HEREBY ORDERED:

ATTORNEYS FEES AND COSTS ARE AWARDED TO THE PLAINTIFF, JANET SCOTT-HARRIS, in the total amount of EIGHTY-THREE THOUSAND ONE HUNDRED SEVENTY-NINE DOLLARS AND SEVENTY CENTS (\$83,179.70) against the defendants City of Fall River, Marilyn Roderick and Daniel E. Bogan, jointly and severally.

The current rate of post-judgment interest is 5.70% per annum.

/s/ Patti B. Saris  
UNITED STATES  
DISTRICT JUDGE

9112057.jgm

[Entered on docket  
8/14/95. DW]

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UNITED STATES DISTRICT COURT  
FOR THE  
DISTRICT OF MASSACHUSETTS

JANET SCOTT-HARRIS	)	
	)	NO. 91-12057-PBS
Plaintiff	)	
v.	)	
CITY OF FALL RIVER,	)	
DANIEL E. BOGAN, AND	)	
MARILYN RODERICK	)	
Defendants	)	

NOTICE OF APPEAL

The Defendant, **City of Fall River**, hereby appeals from the Judgment entered June 6, 1994, the denial of its Motion for Judgment Notwithstanding the Verdict, and from the Judgment on Attorneys Fees entered August 14, 1995.

City of Fall River  
by it [sic] attorney,  
/s/ Stephen C. Fulton  
Stephen C. Fulton  
LAW OFFICES OF  
BRUCE R. FOX  
200 State Street  
Boston, MA 02109  
617-439-4777

[Certificate of service omitted in printing.]

UNITED STATES DISTRICT COURT  
FOR THE  
DISTRICT OF MASSACHUSETTS

JANET SCOTT-HARRIS,	)	NO. 91-12057-PBS
PLAINTIFF	)	
VS.	)	
CITY OF FALL RIVER, DANIEL	)	
E. BOGAN, AND MARILYN	)	
RODERICK,	)	
DEFENDANTS	)	

NOTICE OF APPEAL

The Defendant, Marilyn Roderick, individually, hereby appeals to the United States Court of Appeals for the First Circuit from the Judgment entered June 6, 1994, the denial of her Motion for Judgment Notwithstanding the Verdict, and from the Judgment on Attorney's Fees entered August 14, 1995.

Marilyn Roderick,  
by her attorney,  
/s/ Bruce A. Assad  
Bruce A. Assad, Esquire  
10 Purchase Street  
P.O. Box 1268  
Fall River, MA 02722-1268  
(508) 673-2004  
BBO# 022980

DATED: August 21, 1995

[Certificate of service omitted in printing.]

UNITED STATES DISTRICT COURT  
FOR THE  
DISTRICT OF MASSACHUSETTS

\*\*\*\*\*

JANET SCOTT-HARRIS,

Plaintiff

C.A. NO.  
91-12057-PBS

VS.

CITY OF FALL RIVER,  
MASSACHUSETTS, DANIEL E.  
BOGAN, Individually, MARILYN  
RODERICK, Individually,

Defendants

\*\*\*\*\*

**DEFENDANT, DANIEL E. BOGAN'S,  
NOTICE OF APPEAL**

The Defendant, Daniel E. Bogan, hereby appeals from the Judgment entered June 6, 1994, the denial of its Motion for Judgment Notwithstanding the Verdict, and from the Judgment on Attorneys Fees entered August 14, 1995.

DANIEL E. BOGAN,  
Defendant,  
By his attorney,

DATED: August 22, 1995

/s/ Robert J. Marchand  
Robert J. Marchand,  
Esquire  
DRISCOLL, MARCHAND &  
BOYER  
206 Winter Street,  
P.O. Box 2527  
Fall River, MA 02722  
(508) 672-8652

[Certificate of service omitted in printing.]

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

JANET SCOTT-HARRIS )

Plaintiff )

v. )

CITY OF FALL RIVER, )  
MASSACHUSETTS; et. al. )

Defendants )

CA NO. 91-12057 PBS

**NOTICE OF APPEAL**

The plaintiff, Janet Scott-Harris, appeals to the United States Court of Appeals for the First Circuit from The Memorandum and Order of the District Court dated August 11, 1995 and from the Orders dated August 14, 1995 allowing the motions of the defendants City of Fall River, Marilyn Roderick and Daniel E. Bogan to Reopen the Time for appeal Pursuant to Fed. R. App. P. 4(a)(6).

Janet Scott-Harris, plaintiff  
By her attorneys,

/s/ Harvey A. Schwartz  
HARVEY A. SCHWARTZ  
Schwartz, Shaw & Griffith  
205 Portland Street  
Boston, Massachusetts 02114  
(617) 227-2414  
BBO # 448080

[Certificate of service omitted in printing.]



UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

No. 95-1950

215

JANET SCOTT-HARRIS,  
Plaintiff, Appellee,

v.

CITY OF FALL RIVER,  
Defendant, Appellant.

95-1951

JANET SCOTT-HARRIS,  
Plaintiff, Appellee,

v.

CITY OF FALL RIVER, ET AL.,  
Defendants, Appellees,

MARILYN RODERICK, INDIVIDUALLY AND IN  
HER OFFICIAL CAPACITY AS A MEMBER OF  
THE FALL RIVER CITY COUNCIL,  
Defendant, Appellant.

95-1952

JANET SCOTT-HARRIS,  
Plaintiff, Appellee,

v.

CITY OF FALL RIVER, ET AL.,  
Defendants, Appellees,

DANIEL E. BOGAN,  
Defendant, Appellant.

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ORDER OF THE COURT

Entered: September 27, 1995

Upon consideration of appellants joint motion,

It is ordered that the above captioned appeals be  
consolidated for the purpose of briefing and argument

By The Court

FRANCIS P. SCIGLIANO, Clerk

By: JANICE M O'NEIL  
Chief Deputy Clerk

[cc: Messrs. Fulton, Schwartz, Assad and Marchand]

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UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

No. 95-1950

JANET SCOTT-HARRIS,  
Plaintiff, Appellee,

v.

CITY OF FALL RIVER,  
Defendant, Appellant.

No. 95-1951

JANET SCOTT-HARRIS,  
Plaintiff, Appellee,

v.

CITY OF FALL RIVER,  
Defendants, Appellees,

MARILYN RODERICK,  
Appellant.

No. 95-1952

JANET SCOTT-HARRIS,  
Plaintiff, Appellee,

v.

CITY OF FALL RIVER, et al.,  
Defendant, Appellee,

DANIEL E. BOGAN,  
Defendant, Appellant.

No. 95-2100

JANET SCOTT-HARRIS,  
Plaintiff, Appellant,

v.

CITY OF FALL RIVER, MASSACHUSETTS,  
Defendant, Appellee.

218

ORDER OF COURT

Entered: June 18, 1996

Upon consideration of the motions filed in the above captioned cases by the Defendants-Appellants, City of Fall River,

It is ordered that said appeals be and the same hereby are consolidated for the purpose of briefing and argument.

It is further ordered that the City of Fall River and related parties be allowed to file one consolidated appellant's brief consisting of 100 (one hundred) pages exclusive of the table of contents, citation, addendum, etc. The time for filing said brief shall be enlarged to and including July 26, 1996.

By the Court:

WILLIAM H. NG  
Clerk

[cc: Messrs. Schwartz, Fulton, Assad, Marchand]



UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

\* \* \*

[p. 8-40] CHARGE TO THE JURY BY SARIS, D. J.

THE COURT: The jury should stay standing. Everyone else may be seated.

There is an old tradition that at this stage in the proceedings the judge stands and faces the jury and the jury stands and faces the judge. This is the way that we symbolize the important role that we both play in this process.

It's been my job to empanel a fair and impartial jury. I've watched you over the course of the last week and a half. You've paid attention, you've taken notes. I thank you for that.

My second job, as I mentioned, was to rule on evidentiary objections. That job is now over. We did that during the course of the trial before you came and after you left.

My third and final task is to give you the instructions of law. You must follow those instructions whether you agree with them or not.

To the extent I say something different from what the attorneys said, you must follow what I say. You should not unduly emphasize one portion or minimize another portion. Sometimes I repeat a section of the instructions, either because I get a confused look on your face or because [p. 8-41] I want to make sure you get it down correctly.

I almost feel the need to apologize after I've listened to four such eloquent closing arguments. A lot of what I

will be doing will be reading. And that's to make sure that you get the law accurately as given to us by the Congress and the Supreme Court.

Now, my job, as I'm sure you will now all agree, is the easy one. Because we stand and face you, I stand and face you, we all stand when you come in, because you are the judges of the facts in this case. You're the ones who decide which witnesses to believe and which witnesses not to believe. You decide what the reasonable inferences are to draw from the evidence. You assess the credibility of the witnesses, not any of us.

As I mentioned to you at the start of the case, "verdict" is Latin. It comes from the Latin which means to speak the truth. And that's what I will ask you to do as part of your deliberative process.

Now this jury charge is divided into three portions. And don't worry, we don't stand for all of them.

The first portion is very general and it's basically the same as that preliminary set of jury instructions that I gave you when you were brand-new walking into this building a week and a half ago.

The second portion is very specific to that special [p. 8-42] verdict form I gave you. I'll help you answer those questions by giving you the legal standards you must follow in answering those questions.

The third and final portion of the charge, which is very brief, is telling you a little bit about the mechanics of the deliberative process, how to go about it, and talks to you a little bit about selecting a foreperson and what those jobs are.

Now, I have to apologize in advance. We do not give you a transcript of the charge. Some judges type the whole thing and it looks great. I don't do that. I have a little of it here, and a little of it here, and a little of it here. I often will look at you to get a sense of whether you are understanding it or not.

So you will not have a fixed copy of my charge to go back with you into that jury room.

You do have notebooks and I'll repeat certain portions to make sure you get it down. I'll give you a tape recording of what I say. In that way you can go back through it if there are any questions.

And, finally, you know, I've been working with these attorneys now over the course of a couple of days to get this accurately to you. You can ask me questions. Send me back a note and say: We don't get this. Please explain the law.

[p. 8-43] The one thing I will never do if you send me back a question is, I'll never tell you what my view of the evidence is, because it's irrelevant. It's your view that counts.

So why don't we get seated and get going here.

Now, I'm starting on the first section of the charge, which is the general portion about the role of the jury and fact-finding.

As I mentioned, and I can't state strenuously enough, you're the only ones to determine the credibility of the witnesses.

During the course of this trial there have been extremely sad moments, there have been happy, even funnier moments. Different things have happened in the courtroom. Nothing that I have done or said, whether in questioning attorneys or in facial expressions, is in any way meant to indicate my views about the credibility of a witness or the truthfulness of a response.

Now, over the course of time you may have seen facial gestures or movements from the attorneys or from people in the courtroom. None of that should influence your view of the credibility of the witnesses. You and you alone looked at that witness stand and you're the one to decide the credibility of the witnesses.

Also, it's your recollection of the evidence which [p. 8-44] controls in this case. You've taken notes. You have memories. It's your collective memory that counts.

So that while you have just heard very powerful closing arguments from the attorneys, your memory of the evidence may differ from their memory. They're doing the best they can. They were working hard over the last week and a half. But it's your memory that controls. They weren't trying to mislead you in any way. If you find that their memory was inaccurate, it's just that your memory is the one here that controls.

You should not consider anything that I say in these instructions as evidence. If you find anything I say misstates the evidence, you should disregard what I say as well.



You should not consider any answers that I struck from the record in considering what the truth is in this case.

I want to stress that I did on occasion ask questions of witnesses. Sometimes it was because if I was confused, I thought maybe you were confused. But it wasn't in any way meant to indicate whether I thought some witness was telling the truth or not telling the truth or was credible or not credible.

Over the course of the trial it's been the duty of the attorneys on each side of this case to object when the [p. 8-45] other side offered testimony or other evidence which the attorney believed was not properly admissible. Given the large number of attorneys in this case, you actually had a very small number of objections. The attorneys did it whenever they felt that the evidence was admissible or inadmissible and I would exclude inadmissible evidence. But you should never hold it against the attorney because I didn't agree with their legal basis for an objection. That's their job to make the objection and you shouldn't hold it against the attorney or the party for making one.

Now, as you remember, you took several oaths here. You took an oath when I asked you questions, when I was empaneling you way back when, a week ago Monday. You took another oath when you became the members of the jury. And the oath that you took and the answers that you made were to render judgment impartially and fairly without prejudice or sympathy and without fear, solely upon the evidence in the case and the applicable law.

Remeber [sic], I asked you a large series of questions as to whether or not you had a bias or a prejudice. I tried to describe to you a little bit about what the case was about. And you're the ones who said you could sit fairly and impartially in this case. A lot of other people didn't say that. You saw them come up and they were gone. You are the jurors in this case that took the oath.

[p. 8-46] There were a lot of moments in this case that were extremely sad on both sides. Now, I certainly felt it and perhaps you did as well. But the case cannot be decided based on sympathy. It's got to be based on your rational analysis of the law as applied to the facts as you find them.

So you need to take the law as I give it to you and apply them to the facts and the burden as you find them, according to the burdens of proof as I give them to you.

Let me go through again what is and is not evidence in this case.

Evidence is the sworn testimony of the witnesses who took an oath to tell the truth, the whole truth and nothing but the truth. The exhibits that were received in evidence and will come with you into the jury room.

By contrast, let me go through this. You now heard many, many questions where the attorney asked a question and the witness said: No, that wasn't the way it is. You should never consider the information in the question as evidence in the case unless there's other evidence that supports it or unless the witness says: Yes, that's the way it is.

Testimony that I struck or excluded or that came in after I sustained an objection should not be considered by you. Occasionally, I allowed in testimony for a limited [p. 8-47] purpose by considering a witness' state of mind, but perhaps it was hearsay, and I said you couldn't consider it for the truth of it.

I want to remind you of all those instructions and to follow them.

The opening statements of attorneys, the closing arguments of attorneys, my instructions are not evidence and nothing that I said during the empanelment process is evidence. Only the testimony of witnesses and the exhibits that come with you into the jury room.

I want to remind you that there are two kinds of evidence that you can consider in this case. There is direct evidence and circumstantial evidence. I went through those at the beginning of this trial.

Direct evidence is direct proof of facts from someone who has seen something or heard something or touched something, or smelled something, or somehow used their senses, their perceptory senses in perceiving an event. And your job is to decide if you agree with that person or not.

Circumstantial evidence is proof of facts from which you may reasonably infer or conclude that other facts exist.

You can consider both kinds of evidence and you're going to need to consider both kinds of evidence in this case. There's direct evidence and circumstantial evidence.

[p. 8-48] You may remember the example that I gave you in this case of the mailman, which obviously had nothing to do with this case. I should say mailperson. Which is whether or not the letter courier, your daughter saw the letter courier deliver the mail to your house and the only question is whether your daughter perceived it correctly, as opposed to whether the mail was shoved through the slot. And you can reasonably [sic] infer whether or not it was shoved through by your letter courier or not and whether it was under all the circumstances of the case your regular letter courier, or whether that person was sick or on vacation.

I like to use that example, again, because it shows that what's reasonable to infer or conclude depends on all the circumstances of the case.

And just like you are the exclusive fact-finders, you're the ones to decide what is reasonable to infer from the facts in this case.

Let me talk to you for a minute about the burden of proof. You may remember a week and a half ago I reminded you that this was a civil case, not a criminal case.

The issues here must be proven by a fair preponderance of the evidence. Put the issue of proof beyond a reasonable doubt out of your mind. Proof beyond a reasonable doubt is not the burden in a civil case. It is the burden in a criminal case. The standard here is the [p. 8-49] plaintiff must prove that her claims are more likely true than not true.



A preponderance of the evidence means the greater weight of the evidence. It refers to the quality and persuasiveness of the evidence, not to the number of witnesses or documents. In determining whether a claim has been proved by a preponderance of the evidence, you may consider all of the testimony of all of the witnesses, regardless of whether that witness was called by the plaintiff or the defendant, and all of the relevant exhibits, no matter who introduced those exhibits.

If you find that the credible evidence on a given issue is evenly divided between the parties, by which I mean that it is equally probable that one side is right, as it is that the other side is right, then you must decide that issue against the party having the burden of proof here, the plaintiff. That is because the plaintiff, who has the burden of proof, must prove more than simple equality of the evidence. She must prove each element at issue by a fair preponderance of the evidence.

On the other hand, the party with the burden of proof need prove no more than a preponderance.

So as I remind you, because it's the way I think about it, is the scales of justice in each hand. Plaintiff must make those scales tip, albeit slightly, in her favor. [p. 8-50] But, if at the end of the case, you find that the scales are evenly balanced, the plaintiff has not met her burden of proof.

Now, we talk about witness credibility here. And as I've said – you probably don't want to hear it anymore – it is totally up to you to decide which witnesses are credible and which witnesses aren't.

And there are a number of common sense factors that you will use in deciding the credibility of a witness.

You should consider – and just listing some of them – any bias or hostility the witness may have shown for or against any party, as well as any interest the witness may have in the outcome of the case.

You should consider the opportunity of the witness to see, hear and know the things about which he or she is testifying. The accuracy of his or her memory, his or her candor or lack of candor, his or her intelligence, the reasonableness and probability of the testimony and its consistency or lack of consistency and its corroboration or lack of corroboration with other credible testimony.

In other words, what you just do is to size up a witness in light of the demeanor [sic] on the stand, the explanations given, and all the other evidence in the case.

Now, I wanted to mention to you briefly that you have heard on several occasions that a certain witness said [p. 8-51] something here and then there's a claim that they said something inconsistent at a prior point in time. Sometimes that came up in the context of these depositions or in an interrogatory answer, or it may have been just some pretrial statement.

To the extent a pretrial statement was made by a party to this litigation, and you have the parties listed there, obviously with the City of Fall River, it would be an agent of the City of Fall River, you can consider that for the truth of the matter stated therein.

However, to the extent it was simply of a witness, you cannot consider a prior inconsistent statement by the

witness of the truth of the matter asserted therein. What that prior inconsistent statement was presented to you for is for an evaluation of the credibility of the witness.

Evidence of a prior inconsistent statement of a witness must not be considered by you as affirmative evidence in determining liability. Evidence of a prior inconsistent statement was placed before you for the more limited purpose of helping you to decide whether to believe the testimony of the witness who contradicted himself or herself. If you find that the witness made an earlier statement that conflicts with his or her trial testimony, you may consider that fact in deciding how much of his or her trial testimony, if any, to believe.

[p. 8-52] And, similarly, if you find there was a prior consistent statement, that is, not as well for determining liability, in this case, the prior consistent statement was presented to you for an evaluation of the witness' credibility.

Now, at this point what I'm going to do is I am moving on to the specific claims in this case. And I'd ask you to make sure you have the special verdict form here, because I will be going through this with you.

Let me just give you an overview of this special verdict form before I get going on the instructions.

As you will notice, there are three defendants that you're going to have to answer questions about. The first is the City of Fall River, the second is Ms. Roderick, and the third is Mr. Bogan.

The first one is the City of Fall River, and those are Questions 1 through 4. If you answer those questions

"Yes," then you have to go on to decide the issues with respect to Ms. Roderick and Mr. Bogan.

However, if you've answered those questions "No," and I'll go through exactly how that sequence works later on, you need not and should not go on to answer the questions about Ms. Roderick and Mr. Bogan.

So that's why we start off with the City of Fall River. And I'll talk to you in a minute about that and then [p. 8-53] go on to the other two defendants.

Now, we have here the final section, which is damages, which is subdivided into compensatory damages and punitive damages. I reached the issues of damages, and I will in these instructions, in case you reach the issue of damages. But you should never infer from the fact that I'm reaching the issue of damages that you need to reach it. I only give you one global charge so that you can go up there and deliberate. I don't give charges in piecemeal segments.

All right. Now, what I'm going to do is first start off with an overview of what Ms. Scott-Harris' claims are in the case and the claims that she has to prove by a fair preponderance of the evidence.

Ms. Scott-Harris claims that her rights were violated in two ways. And those two ways are reflected in Question 1 and Question 2. Excuse me. One and 2 are one of the ways, and Question 3 is the other way.

First she claims that her position as Administrator, Department of Health and Human Services, was eliminated with the city government because she is black. And



that issue is the one that is governed by Questions 1 and 2.

A federal civil rights law prohibits local governments and persons acting under color of state law from depriving another person of any rights secured by the [p. 8-54] constitution or federal law. Here the right is not to be discriminated against in employment based on race.

Her second claim is the following, and it is reflected in Question 3: Ms. Scott-Harris claims that her office was eliminated because she spoke out concerning racist statements made by a city employee and because she initiated proceedings in the city government to discipline the woman who made those statements.

The same federal civil rights act which I just referred to also prohibits the city government and persons acting under color of law from punishing or retaliating against Ms. Scott-Harris because of her protected speech.

These are the two claims made by Ms. Scott-Harris, that her position was eliminated because of her race and because of her speech.

If you find that any one of these claims are violations of constitutional rights has been proven, then you must find for the plaintiff. If you find that she has not proven either of these claims, then you must find for the defendant.

Now, I'll go through these claims in much greater detail right now.

Let me start off with the statutes that we're talking about. What is the civil rights law that I'm referring to?

[p. 8-55] The law to be applied in this case is the federal civil rights law which provides a remedy to individuals who have been deprived of their constitutional rights under color of state law. That statute is 42 U. S. - United States Code, Section 1983. And I'll read it to you. You don't need to get this down because I'm going to be going through in detail what the individual elements that plaintiff must prove are.

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the" person and "party injured in an action at law, suit in equity, or other proper proceeding for redress." That is basically the statute.

Let me go through the individual elements that she must prove and I'll repeat those so you can get that down in the context of this case.

To establish a claim under 1983, which is the civil rights law that I've just read, Ms. Scott-Harris must establish by a preponderance of the evidence each of the following elements. In other words, she must prove that each of the following elements is more likely true than not [p. 8-56] true.

First, that the conduct complained of was committed by a person acting under color of state law. First, that the conduct complained of was committed by a person acting under color of state law.

Second, that this conduct deprived Ms. Scott-Harris of rights, privileges or immunities secured by the Constitution or laws of the United States. Second, that this conduct deprived the plaintiff, Ms. Scott-Harris, of rights, privileges or immunities secured by the Constitution or laws of the United States.

And, third, that the defendants' acts were the proximate – let me spell that – p-r-o-x-i-m-a-t-e – cause of the injuries and consequent damages sustained by Ms. Scott-Harris. Third, let me repeat, that the defendants' acts were the proximate cause of the injuries and consequent damages sustained by Ms. Scott-Harris.

Let me say, I will sometimes refer generically to defendant, but, of course, there are three separate defendants here, as I mentioned before. So that you must make a separate determination under the law with respect to each one separately.

Whether or not any of the defendants committed the acts alleged by Ms. Scott-Harris is a question of fact for you as the jury to decide. And I'll tell you in a moment [p. 8-57] how to go about deciding that, what legal standards to apply. But, for a minute, just assuming that the defendant or a defendant did commit those acts, I want to instruct you that both Ms. Roderick and Mr. Bogan were officials of the City of Fall River at the time of the acts in question. Therefore, they were acting under color of state law.

In other words, as a matter of law, both Ms. Roderick and Mr. Bogan were officials acting under color of state law, because they were officials in the city government.

Now, let me talk to you for a minute about the City of Fall River. The Supreme Court of the United States has held that a city, a municipality, here, the City of Fall River, may be liable for the actions of officials who are final policy-makers. Here, the final policy-makers are the Mayor and the City Councilors. So when I am referring to the City in any part of this charge, and specifically in Questions 1 through 4, which are the questions dealing with the City, I am referring to the Mayor and the majority of the City Councilors who are the ones who made the decision to eliminate the position in this case. So when I refer to the City of Fall River – of course, that's an amorphous entity here – what I have to be doing is referring to the final policy-makers, here, the Mayor and the majority of the City Councilors.

[p. 8-58] All right. So now I dealt with the first prong which is were there officials acting under color of state law.

So the next issue is what is the federal right involved here?

The plaintiff, Ms. Scott-Harris, is alleging that the defendants, each of the defendants, deprived her of her right to be free from discrimination based upon race as guaranteed by the Fourteenth Amendment to the United States Constitution.

The Fourteenth Amendment states in pertinent part: "No state shall deny to any person within its jurisdiction the equal protection of the laws."

Under the civil rights law and the United States Constitution, it is an unlawful employment practice for



any employer to discharge or eliminate a person's position because of such individual's race.

Ms. Scott-Harris bears the burden of proving by a preponderance of the evidence that the City of Fall River intentionally discriminated [sic] against [sic] her because of her race. In other words, that she has been the victim of intentional race discrimination.

The plaintiff, Ms. Scott-Harris, does not have to present direct evidence of discriminatory motive in order to prevail. Remember, I gave you that distinction between [p. 8-59] direct evidence and circumstantial evidence. She does not have to produce direct evidence of discriminatory motive in order to prevail.

The law often obligates a fact finder to inquire into a person's state of mind. You may consider circumstantial evidence in determining whether or not the plaintiff has met her burden with respect to the motives of the City of Fall River and the individual defendants.

Ms. Scott-Harris can rely on circumstantial evidence sufficient to create an inference of racial motivation. Absent direct evidence of discrimination, our Supreme Court has set forth an order for the presentation of proof in actions where a plaintiff, like Ms. Scott-Harris, claims discriminatory treatment. This involves a burden shifting which you must understand to get to the critical and ultimate question here, which is whether Ms. Scott-Harris has proven intentional discrimination.

The plaintiff must first establish by a preponderance of the evidence a prima facie case of racial discrimination.

Now, *prima facie* is the Latin term which essentially means threshold case.

So the plaintiff must first establish by preponderance of the evidence the following threshold case of racial discrimination. And it has four pieces to it and I'm going to read it so you can get it down.

[p. 8-60] First, Ms. Scott-Harris must prove, one, that she is black. I won't repeat that.

Two, that she was qualified for the position of Administrator and adequately performed her job. Two, that she was qualified for the position of Administrator and adequately performed her job.

Three, that her position was terminated. Three, that her position was terminated.

Four, that the employer sought or appointed or designated someone to perform substantially the same work after she left or, alternatively, that white persons were retained in similar positions. Let me repeat that. Four, that the employer sought or appointed or designated someone to perform substantially the same work after she left or, alternatively, that white persons were retained in similar positions.

Here, the City of Fall River does not contest that Ms. Scott-Harris is black, that her position was terminated or that she was qualified for the job and adequately performing it. They do contest the plaintiff has proven the fourth prong.

Once Ms. Scott-Harris has proven by a preponderance of the evidence a prima facie case, this threshold case that I just set forth for you, the City of Fall River

bears the burden of articulating a legitimate non-discriminatory reason [p. 8-61] for the elimination of the position.

Here, the City of Fall River has articulated as its legitimate nondiscriminatory reason that it terminated Ms. Scott-Harris' position for budgetary reasons.

All right. Now, let's move to the ultimate burden which you're going to have to answer.

Now plaintiff has the ultimate burden of proving by a fair preponderance of the evidence that the reason articulated by the City of Fall River was not the true reason for the employment decision and that the real reason for the discharge was intentional racial discrimination.

These two issues are the ones that are addressed by Questions 1 and 2 on your verdict form.

The critical - well, your disbelief of reasons put forward by the City of Fall River - and that's up to you - particularly if disbelief is accompanied by a suspicion of untruthfulness - one again, that determination is up to you - made together with the elements of the prima facie case, which I just gave to you, suffice to show intentional discrimination. Thus, if you reject the City of Fall River's reasons, this would permit you to infer the ultimate fact of intentional discrimination if plaintiff has proven her prima facie case - those first four things - without additional proof of discrimination. However, you are not required to make such a finding.

[p. 8-62] The critical determination for you is whether Ms. Scott-Harris has proven by a fair preponderance of

the evidence that an impermissible consideration, race, was the substantial motivating factor in the elimination of her position.

The ultimate burden is one for the plaintiff to show not merely that the impermissible factor of race entered into the decision to terminate her position, but that it was determinative, that but for her race the position would not have been eliminated.

It is not the City of Fall River's business judgment that is at issue here, but, rather, the City's motivation.

The Civil Rights laws do not protect against all poor or unfair treatment in the workplace. They protect against discriminatory [sic] treatment.

Now, I'm going to move on to the allegation regarding the First Amendment, and that is Question 3.

One of the federal rights which Ms. Scott-Harris alleges, which the city of Fall River and the individual defendants deprived her of, was her right to freedom of speech under the First Amendment to the Constitution of the United States.

Specifically, the plaintiff alleges that while she was a public employee working for the City of Fall River, [p. 8-63] she engaged in one or more specific acts of speech or expression protected by the free speech clause of the First Amendment. That the City of Fall River, acting through its Mayor and City Council, then took specific action to eliminate the position which the plaintiff held and the plaintiff's acts or speech was a substantial or motivating factor in the decision of the City Council and Mayor of the City of Fall River to take such action.



Let me talk to you for a minute about the First Amendment. The Supreme Court has clearly established that the City of Fall River, any city, may not eliminate the position of an employee on a basis that infringes that employee's Constitutionally protected interest and freedom of speech.

Employees of a public agency may not have their positions eliminated for speaking out on issues of public concern. Even though Ms. Scott-Harris did not have an employment contract and even though she served at the pleasure of the Mayor, her position may not be eliminated because she exercised her Constitutional right of freedom of expression or in retaliation for such exercise of her protected speech.

In order to prove her allegation against the defendants, the plaintiff must establish each of the following two elements as to each defendant:

[p. 8-64] First, that her acts of speech or expression were protected by the free speech clause of the First Amendment.

And, second, that these acts of speech were a substantial or motivating factor in the decision of the City Council and Mayor of the City of Fall River to amend the City Ordinance eliminating the position of Administrator, Health and Human Services.

That is essentially the burden which I've set forth for you in Question No. 3.

The plaintiff alleges that while employed by the City of Fall River as Administrator of Health and Human Services she made statements condemning racism and

instituted disciplinary proceedings against a city employee for making racial comments.

I am telling you and ruling as a matter of law that if, in fact, you find that she did make such statements, the free speech clause of the First Amendment does protect that speech.

The second element of the plaintiff's claim is that her protected speech or act of expression was a substantial or motivating factor in the decision of the Mayor and City Council to eliminate the position which she held.

The plaintiff's protected speech was a substantial or motivating factor in the decision to eliminate the position which the plaintiff held if it played a substantial [p. 8-65] part in the actual decision to eliminate the position of Administrator of Health and Human Services.

You may find that the defendants acted against the plaintiff solely because of the plaintiff's exercise of her free speech rights.

If based on the evidence you make that finding that Ms. Scott-Harris' protected speech was a substantial or motivating factor in the City's decision - wait, I did that wrong. Let me start that again.

You may find, based on the evidence, that the defendants acted against the plaintiff solely because of the plaintiff's exercise of her free speech rights. If so, if you find that was a substantial and motivating factor, you must find the plaintiff's protected speech was a substantial or motivating factor in the defendants' discharge.

On the other hand, you may find that the defendants acted against the plaintiff for many different reasons. If

so, then you must determine whether one of those reasons was the plaintiff's exercise of her free speech rights. If it was one of the many reasons, then you must determine whether or not it played a substantial part in the actual decision to take action against the plaintiff. If it did play a substantial part, then you must find the plaintiff's protected speech was a substantial or motivating factor in the decision.

[p. 8-66] If it did not play a substantial part, you must find that the plaintiff's protected speech was not a substantial or motivating factor in the defendants' decision.

So, in other words, you have to make that decision with respect to Question 3.

Now, what is Question 4?

You heard that term because I just used it. Did Ms. Scott-Harris prove that the elimination of her position by the City of Fall River, the Mayor and the City Councilors, proximately caused her any injuries?

What does that term "proximate cause" mean? You'll notice I used that term in Question 4 and in subsequent questions.

The defendants' actions are the legal cause of the plaintiff's injuries if it is a substantial factor in bringing about the harm. Therefore, you must determine whether the actions of this defendant - I mention that because there are three different defendants - are a substantial factor in causing the plaintiff's injury.

You may consider the following elements in your determination: One, the number of other factors which contributed in producing the harm and the extent of the

effect which they had in producing it. Two, whether the defendant's conduct continued to be an active force in every [p. 8-67] instant up to the time of the harm. And, three, the amount of time which lapsed between the defendant's action and the plaintiff's harm.

It does not matter whether other concurrent causes contributed to the plaintiff's injuries so long as you find that the defendant's actions were a substantial factor in producing them.

If defendant's actions were a substantial factor, then they were the legal cause or what we call the proximate cause.

In order to prove proximate causation, the plaintiff is required to show that there was a greater likelihood of a probability that the harm complained of was due to causes for which the defendant was responsible than from any other cause.

However, the plaintiff is not required to eliminate entirely all possibility that the defendant's conduct was not a cause. It is enough if she introduces evidence from which you as reasonable men and women may conclude that it is more probable that the injury was caused by the defendant or defendants than that it was not.

All right. So now I have addressed Questions 1 through 4.

If you have answered both Questions 2, 3 and 4 "No," then you need not answer any other questions.

[p. 8-68] If you've answered Question 4 "Yes" - in other words, you've gone through the proximate causation analysis - you need to answer a set of questions with



respect to Marilyn Roderick and a set of questions with respect to Daniel Bogan.

Those questions I will not separately charge you on because they essentially track the same standards that I just gave you for the City of Fall River. In other words, Question 5 deals with whether or not you find that Ms. Scott-Harris has proven that Ms. Roderick voted to approve an amendment of city ordinances which would have the effect of eliminating the position of Administrator of Health and Human Services with the intent to terminate Ms. Scott-Harris' employment because she is black. That's that intentional racial discrimination that I went through with you.

The second one is whether or not Ms. Scott-Harris has proven that her Constitutionally protected speech was a substantial or motivating factor in the vote of Ms. Roderick favoring amendment of the City Ordinance having the effect of eliminating the position of the Administrator of Health and Human Services. I've set forth the standards in the question.

And, finally, whether or not if you've answered 5 and/or 6 "Yes," whether or not her, Ms. Roderick's, actions [p. 8-69] were the proximate cause of the elimination of the position. In other words, whether or not they were a substantial factor in causing the elimination of the position.

The same questions, almost identically, except with the name of Mr. Bogan, are asked in 8, 9 and 10.

Now, if you have answered [sic] affirmatively to Question 4, or to Question 4 and Questions 7 and 10, you

need to address the issue of damages. And, once again, I am giving you the issue of damages because I give you one charge at one time.

If you return a verdict for the plaintiff, then you must award her such sum of money as you believe will fairly and justly compensate her for any injury you believe she actually sustained as a direct consequence of the conduct of the particular - of the defendants or defendant.

You shall award actual damages only for those injuries which you find that the plaintiff has proven by a preponderance of the evidence. You should not engage in any speculation or conjecture. You shall award actual damages only for those injuries which you find the plaintiff has proven by a preponderance of the evidence to have been the result of the conduct of the defendant in violation of Section 1983.

Here, the plaintiff is seeking essentially three types of compensatory damages. Actually, one of the most [p. 8-70] frequent questions I get is: Well, how do I figure out damages? Well, that's why we have you here, is to use your common sense and good judgment. And we have no precise formula. I am simply going to tell you the areas that you must consider and it's up to you to decide what would be fair compensation for those - or fair amount of damages.

The first area that plaintiff is seeking as damages are what we call special damages, which means those damages that can be easily quantified in terms of dollars. Those include items such as lost wages.

General damages are more difficult to reduce to a specific dollar amount. And the general damages include injuries such as emotional distress.

So first are the special damages. In other words, the kind that can be quantified easily in terms of - I'll go through those with you. Second is an area of emotional distress.

And thirdly, plaintiff is seeking punitive damages in addition to the actual damages suffered by the plaintiff.

The plaintiff is entitled to the income she lost as a result of defendants' conduct. In computing the amount of the plaintiff's lost income you should consider the period in which she received no income, and also any difference between her income when she found work and what her income had been while she was employed by the City. And you should [p. 8-71] also determine the duration of the difference in income.

She seeks additional expenses that she was required to pay as a result of her new employment. In other words, she's seeking certain commuting expenses that resulted from having to commute from Fall River to Boston.

There is no request here for future lost wages.

Now, with respect to general damages. In addition to her actual money damages, she is entitled to compensation for any emotional distress or embarrassment as a result of any violation of her Constitutional rights. Emotional distress refers to mental anguish, mental suffering, mental disturbance, humiliation, nervous shock, distress of mind or anxiety.

You should determine an amount of money that will fully compensate the plaintiff for her personal humiliation and emotional distress. And you may make that decision even though the assessment will be by nature imprecise.

Now, the third area involves the request for punitive damages. And, actually, before I get to that, you will note that in Question No. 3 I ask you to write down both the dollar amount and to write it out in words, and that's just to make sure that everybody is in agreement with exactly what that figure is.

Now, the issue of punitive damages, if you award the plaintiff actual damages - and, by the way, you do have [p. 8-72] the option, if you find that plaintiff's civil rights were violated, to award what's known as nominal damages, minimal damages, if you find that her rights were violated but she didn't suffer any actual injuries that are compensable as a result of it.

But let me move on, now, to the area of punitive damages. If you award the plaintiff actual damages, then you may also make a separate and additional award of exemplary or punitive damages against any or all of the individual defendants.

You may not impose punitive damages against the City of Fall River. As a matter of law, a jury cannot assess or anybody cannot assess punitive damages against a municipality. So, as you'll notice, these questions only refer to Ms. Roderick and Mr. Bogan.

You may also make an award of punitive damages even though you find the plaintiff has failed to establish



actual damages. So that even if you find that there are only nominal damages, you can still award punitive damages.

Punitive damages are awarded in your discretion. It's up to you to punish a defendant for extreme or outrageous conduct or to deter or prevent a defendant and others like them from committing such conduct in the future.

Where a plaintiff in a civil rights case establishes the element of malice or callous and reckless [p. 8-73] indifference by preponderance of the evidence, then a jury is allowed in its discretion to assess punitive damages against the defendant for the purpose of punishing the defendant and also for the purpose of deterring others.

An act is maliciously done if it is prompted by ill will or spite towards the injured person. An act or failure to act is reckless if done in reckless or callous disregard of or indifference to the rights of the injured person.

The plaintiff has the burden of proving by a preponderance of the evidence that the defendant acted maliciously or recklessly with regard to her rights.

And that's why you'll notice under the punitive damage section there are two separate questions. One is with respect to the standards for imposing punitive damages, and the second is as to the amount.

Punitive damages are awarded in your discretion, as I mentioned. In deciding whether to award the punitive damages, you should consider whether the defendant may be adequately punished by an actual award of compensatory damages or whether the conduct was so

extreme and outrageous that actual damages are inadequate to punish the wrongful conduct.

You should also consider whether actual damages standing alone are likely to deter or prevent the defendant from again performing any wrongful act he or she may have [p. 8-74] performed or whether punitive damages are necessary to provide deterrence.

Finally, you should consider whether punitive damages are likely to deter or prevent other persons from performing wrongful acts similar to those defendants may have committed.

Now, in calculating damages, I want to make it clear that there are three things that you should not consider.

First is, don't consider the issue of interest. That's something that I consider.

The second is, don't consider the issue of taxation.

And third, don't consider the issue of attorneys' fees.

Those three areas are totally irrelevant to your determination at this point.

All right. Essentially, that's the end of the verdict form and the end of the middle portion of my instructions.

The third section is with respect to the selection of a foreperson. I leave that, in most cases, up to the jury. So that should be your first act when you get upstairs.

I want to say that each one of your questions has [p. 8-75] to be answered unanimously. We do not exclude any alternates so all of you will go up and deliberate.

Whoever you choose has certain obligations to me and let me list those. They're administrative obligations, rather than substantive ones. In other words, the foreperson isn't more equal than the rest. He or she just has certain obligations to the Court.

The first is that the foreperson is the one who fills in the verdict form. And as you notice, that foreperson must certify to me that it is a hundred percent of the jurors who either vote yes or vote no or who agree on a damage figure. That is what – it's got to be unanimous.

Second is, that the foreperson is the one who will communicate with me. In other words, I don't want notes from all sorts of different people on different issues. If there is a legal question, the foreperson will sign the form and date it, put a time down, hand it to – you'll notice we now have a court officer here, who is going to protect your deliberative process – hand it to him and he'll get it to me. I confer with the attorneys.

As I mentioned, I'm happy to clarify any legal questions that you have. And often I find if there's a logjam or a point of indecision, just a legal question will sometimes help.

I won't answer any factual questions because your [p. 8-76] memory is just as good as mine, probably better, because you have a group of you deciding it.

The third obligation of the foreperson is when a verdict is reached, you're the one who stands up and announces it in Court.

Now, whoever it is, is not the person who's standing alone, because, as I said, it's a unanimous verdict. And

you'll hear our clerk here say: So say you Madam or Mr. Foreperson? So say you all members of the jury? So all of you are standing there. But he or she will be the one who actually announces the verdict in Court.

So those are essentially the obligations of the jury foreperson.

I have never been on a jury. I've never been called for jury duty and I know – remember those peremptorial challenges. I'd be the first one out of there. But I have the luxury of speaking to jurors after most trials, especially where the jury wants to speak to me.

I just want to give you some sense of how to approach this deliberative process. These are extremely difficult cases. I mean, you've seen it. People care a lot about these cases. And sometimes I am required to decide these kinds of issues by myself. And I would give anything, anything, for other people to bounce my ideas off of. Because, just by being human, you've sat here for the last [p. 8-77] week and a half, you must have some instincts about what you think that the correct result of this trial is. But they're tough, tough issues.

So the way to walk into this is, of course, with your human instincts as to what's fair and just, but with an open mind, just saying: Well, what do you think? And with a willingness to change if you think the other person's approach is more reasonable.

The way not to walk in is: I know what I'm going to do. No one is going to budge me. And sit there like some stubborn person, as if there's only one true and just result. That's the wrong way to approach it.



Walk in there with an open mind, willing to listen to what other people have to say.

On the other hand, each one of you were chosen by these attorneys because you had a unique contribution to this process. You really do represent every different age group of men and women from every different corner of this state. You represent occupations. You represent who we are in the State of Massachusetts. So that nobody here should view their views as less important than another person's views. And you shouldn't just change your mind because you're sick of being here in Federal Court or it's a gorgeous spring day outside or you're just basically just sick of the whole thing. It's just too important. So make [p. 8-78] sure if you change your mind, you do it because you're persuaded, that you think that the other result is fairer. And if you approach it that way, that is the way we found for 800 or more years that the jury system is supposed to work. And it's not a perfect system. It's the best way we now have.

Don't ask any questions of my staff to the extent they're upstairs with you. I know that there have been cases that have been reversed because people on the Court staff have improperly talked to jurors about cases. So they're put in a position of being rude to you in not being able to talk about it.

Any questions about the case must be put down in writing and sent to me.

That's different than logistical issues, like "When are we getting lunch?" Or "What can we have?" Of course you can talk to them about those kinds of things.

As I mentioned, we will now have a court officer. I'm protecting your process. And he'll be the person who will make sure that no one interferes in any way with that process.

As I understand it, we will have lunch at about one o'clock. I don't care if you have a working lunch. But I do care if you bring your exhibits into the lunchroom. Because they're what we've got. In many cases, they're the [p. 8-79] originals. I can't risk having a can of Coke or mustard or whatever it happens to be all over those exhibits. So that to the extent that you're eating, don't bring the exhibits with you.

Now, what I'm going to do right now is I need to talk to the attorneys for a second. We actually spent a couple of hours yesterday going through the charge and it's sort of been an ongoing process as this case has continued.

As I mentioned, I don't just have a form charge because I like to explain it as I go along. It may be that I read something wrong or it may be that I thought I was explaining something clearly and I wasn't. Or that something came into an attorney's mind that might need clarification. Or simply that they may want to object to what I said.

So what I need to do is bring the attorneys up here and rather than send you up and have to bring you back again, I find this is more efficient, because I think I know what they're going to say. And what you can do is just stand and stretch while I talk to them and then I can send you upstairs to do your work.

(CONFERENCE AT THE BENCH AS FOLLOWS:

MR. SCHWARTZ: Content.

MR. FULTON: A couple of points. Just on the [p. 8-80] fourth prong, you mentioned the two alternative [sic]. One was that someone was thought to do the same work. It's not a big deal, but I think to be really correct it should be someone who is not black, a white person. That is what this is all about.

THE COURT: I'm not sure that that's right. I took it right out of - I would be reluctant to tamper with it at this point.

MR. FULTON: The other thing for me, you might want to mention there is no need that they must state they're - [loud noise] when they make a decision.

THE COURT: No, but every jury made has taken their lunch. I will not comment on that.

MR. ASSAD: Judge, the information on the verdict slip as it presents to Bogan and Roderick as to what a substantial fact would be in and of themselves. However, they could do it - it may not be a substantial factor unless they act in concert with others, such as Roderick would have had to have spoken with other City Councilors, she can't be -

THE COURT: I didn't give that instruction ever.

MR. FULTON: I think we all have been saying that in that directed verdict motion.

THE COURT: That is part of the directed verdict question of law. I would be reluctant to tamper with

the [p. 8-81] proximate cause instruction. I said they can't find against these folks unless they find against the City of Fall River. I would be reluctant [sic] to tamper with it.

Anything from you?

MR. MARCHAND: No.

THE COURT: I think that is your directed verdict issue. But I don't know how I can instruct them on proximate causation other than the standard that I gave, that they have to be a substantial factor in causing it. All right?

Fine. I'm actually not going to do anything here. All right.

... END OF CONFERENCE AT THE BENCH.)

THE COURT: I have nothing more to tell you. It may take a couple of seconds to get the exhibits up to you. They come in - attorneys number them in advance, so that's why they don't come in numerically, you know, 1, 2, 3, 4. I want to make sure that we've got them all to you. But, please, if you think something has been introduced as an exhibit and then you don't see it there, send me a little note and I can doublecheck to make sure that everything is there.

MR. SCHWARTZ: One second?

THE COURT: Yes.

[p. 8-82] (CONFERENCE AT THE BENCH AS FOLLOWS:

MR. SCHWARTZ: You're going to instruct them there are gaps in the numbering. So they shouldn't expect to find all the exhibits.



THE COURT: Fine.

. . . END OF CONFERENCE AT THE BENCH.)

THE COURT: Counsel as a helpful point mentioned that because they numbered them in advance there may be certain exhibits that one side or the other just didn't feel it was appropriate or necessary to introduce. So you may find actual numerical gaps in the numbering of the exhibits. So don't be worried about that. It's more along the lines of you remembered some document coming in and it's not there. I had the attorneys go through it to make sure it's all there, but everyone's human and can make a mistake. So just if you think something should be there and isn't, ask for it. Just so we can doublecheck and make sure that you have everything you're supposed to have.

All right. So at this point what we will do is stand in recess. And one last thing I want to make sure is - we will at some point at around 4:30ish say to you: What do you want to do? We'll probably send you home at about five and have you come back tomorrow. But we're not trying [p. 8-83] to rush you at all. Nothing anyone is saying is trying to have you rush. So please don't take it that way at all. Okay.

(Whereupon the jury left the courtroom at 12:30 p.m.)

(Recess.)

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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

[Question From The Jury]

[p. 8-84] (1:20 p.m.)

(The following is in the conference room.)

THE COURT: Is everyone content with the exhibits?

MR. FULTON: City of Fall River is content.

MR. MARCHAND: Defendant Bogan is content.

MR. ASSAD: Marilyn Roderick is content.

MR. SCHWARTZ: We're content.

THE COURT: The jury sent down a question earlier which all counsel agreed to and I responded in writing. And was that marked as an exhibit?

THE CLERK: They kept it upstairs and I told them to keep it and not throw it away because we need to attach it to the record.

THE COURT: The second question: Can we have the blowup charts for easier clarification on certain budget issues?

All three defendants protest and object to this vigorously. The plaintiff wants to send it up.

I'm not going to send it up because I think it unduly emphasizes one portion. I will write to the jury if they want the pages the blow-ups come from, I will write them down. I did notice some of them took notes on that. If, in fact, there is some confusion and that's why they wanted the blow-up, as to what pages they came from, I would give them that again.

[p. 8-85] MR. FULTON: I object to allowing the jury to be infomed [sic] as to any pages or having them be allowed to fill in any gaps in any notes they may have taken. And I object to the charts going to the jury, also.

MR. ASSAD: The same for the Defendant, Roderick.

MR. MARCHAND: The same for Bogan.

THE COURT: I will write it down to make sure no one has objection other than the ones that you've stated. What two exhibits were they?

MR. SCHWARTZ: There were four charts that came from two different exhibits, 39A and 40A. One is from 40 and one is from 39. One is from 40A and one is from 39A.

THE CLERK: That is Exhibit 1 from each of the respective budget years '91 and '92.

(The Court writes answer down and shows it to counsel.)

MR. FULTON: I've now read the judge's response and I make the same objection that I did previous.

THE COURT: Basically -

MR. ASSAD: Also for Mrs. Roderick.

MR. SCHWARTZ: I have no objection.

THE COURT: Basically, the response is no. However, if the jury wants the page numbers of the exhibits which those blow-ups came from, you should send me a note.

(Recess.)

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

[Question From The Jury]

[p. 8-86] (Whereupon the jury entered the courtroom at 3:07 p.m.)

THE COURT: At least a few of you are still smiling.

I will say that in the five years or so that I've been doing this, you are the most inquisitive jury that I have had in such a short time span. But I don't mean that in any way as criticism. In fact, these are extremely hard issues that you're grabbling [sic] with. And you'll be happy to know or at least know that misery loves company in the sense that the Supreme Court of our country and the Congress of our country has struggled with exactly these kinds of issues.

Let me say, I've talked with the attorneys about your question. For the record, I'll read the question and then I'll tell you the instruction that we all agreed made sense under the law.

So the question reads: "Judge Saris, we are having difficulty interpreting the wording of the first question. As stated, Was not the true reason. Should or may we interpret that as not the sole or only reason or in some other manner? It is a major stumbling block for all of us. Obviously, this first question will set things going forth. Jim McManus."

That is Mr. McManus?

(Juror raises hand.)

[p. 8-87] THE COURT: All right.



I'm not going to reread all my instructions on the first question. I'm only going to tailor it to the question you specifically asked me. Although, if you want me to, you can come back down here and I can read you everything. We have the tape if you want to go through the whole thing. That's why I'm not going to reread it now.

Let me just say the following: Fall River has stated that the only factor in its decision to eliminate the position of Administrator of Health and Human Services was budgetary.

If you find that there was more than one reason for the elimination of that position, you must decide whether the budgetary concern was the substantial motivating factor. If it was the substantial motivating factor, answer "No" to Question 1. If it was not the substantial motivating factor, answer "Yes" to Question 1.

Do you want me to read that one more time? Everyone's got it? All right.

We're awaiting your every word. I'll let you go up. And if you need me to do anything else, I'll be happy to do that.

Actually, before I send them up, I think that reflects what we all talked about.

MR. SCHWARTZ: Yes.

[p. 8-88] MR. ASSAD: Yes.

MR. FULTON: Yes.

MR. MARCHAND: Yes.

THE COURT: Okay, fine.

(Whereupon the jury left the courtroom at 3:11 p.m.)

(Recess.)

[p. 8-89] (Whereupon the jury entered the courtroom at 4:38 p.m.)

THE COURT: You don't even need to be seated. Well - actually, sit down.

I'm going to send you home now. I can see some of you are just ready and eager to go. What I would like to say, as I always say, you can't talk about it tonight, of course, at home. But even tomorrow morning, you probably know by now that a few of you come in bright and early, I see you, and some others straggle in at nine. You can't talk about the case until everybody is in the room at the same time.

The way I proceed is I get word from someone that - you know, either Nancy or Debbie or someone - that you're all here. I bring you in, make sure you're all here, and then send you out to deliberate. The whole process takes 30 seconds. Until I do that, don't talk about the case.

We'll collect your notebooks - we've got them already - and we'll just hand them back out to you tomorrow.

Once again, we will feed you and treat you with tender loving care and the room is yours for as long as you need it. We'll stand in recess.

(Whereupon the jury left the courtroom at 4:40 p.m.)

(Whereupon the Eighth Day of Trial was concluded.)

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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

[Jury Verdict]

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[p. 9-4] (Whereupon the jury entered the courtroom at 3:55 p.m.)

THE CLERK: May I inquire of the jury?

THE COURT: You may.

THE CLERK: Mr. Foreperson or is it madam?

Has the jury agreed on a unanimous verdict, yes or no?

THE FOREPERSON: Yes, we have.

THE CLERK: May I see it please.

(Pause.)

THE CLERK: Mr. Foreperson, would you please remain standing.

Mr. Foreperson, as to the special verdict form regarding City of Fall River Question 1, has Ms. Scott-Harris proven that the reason given by the City of Fall River for the elimination of the position of Administrator, Health and Human Services, was not the true reason? How did the jury answer, yes or no?

THE FOREPERSON: No.

As to Question 3, has Ms. Scott-Harris proven that her protected speech was a substantial or motivating factor in the City's decision to eliminate the position of, Administrator, Health and Human Services? How did the jury answer, yes or no?

THE FOREPERSON: Yes.

THE CLERK: Going to Page 2 of the special verdict [p. 9-5] form. As to Question 4, has Ms. Scott-Harris proven that the elimination of her position by the City of Fall River proximately caused her any injuries? How did the jury answer, yes or no?

THE FOREPERSON: Yes.

THE CLERK: In regards to Marilyn Roderick. Question 5. Has Ms. Scott-Harris proven that Councilwoman Marilyn Roderick voted to approve an amendment of city ordinances which would have the effect of eliminating the position of Administrator, Health and Human Services, with the intent to terminate the plaintiff's employment because she is black? How did the jury answer, yes or no?

THE FOREPERSON: No.

THE CLERK: As to Question 6, has Ms. Scott-Harris proven that her constitutionally protected speech was a substantial or motivating factor in the vote of Fall River City Councilwoman Marilyn Roderick favoring amendment of city ordinances which would have the effect of eliminating the position of Administrator, Health and Human Services? How did the jury answer, yes or no?

THE FOREPERSON: Yes.

THE CLERK: As to Question 7, has Ms. Scott-Harris proven that the act of Councilwoman Marilyn Roderick in voting favorably toward the amendments was a proximate cause of the elimination of the position of Administrator, Health [p. 9-6] and Human Services? How did the jury answer yes or no?



THE FOREPERSON: Yes.

THE CLERK: Going on to Page 3. Daniel Bogan. As to Question 8, has Ms. Scott-Harris proven that Mayor Bogan recommended an amendment to city ordinances which would have the effect of eliminating the position of Administrator, Health and Human Services, with the intent to terminate the plaintiff's employment because she was black? How did the jury answer, yes or no?

THE FOREPERSON: No.

THE CLERK: As to Question 9, has Ms. Scott-Harris proven that her constitutionally protected speech was a substantial or motivating factor in the recommendation by Daniel Bogan, then Mayor, of the amendment of city ordinances which would have the effect of eliminating the position of Administrator, Health and Human Services? How did the jury answer, yes or no?

THE FOREPERSON: Yes.

THE CLERK: As to Question 10, if you answered yes to Questions 8 or 9, do you find that the act of Mr. Bogan in recommending the amendment was the proximate cause of the elimination of the position? How did the jury answer, yes or no?

THE FOREPERSON: Yes.

THE CLERK: As to the question of damages, [p. 9-7] compensatory, Question No. 11. If you answered Question 4, 7 or 10 yes, what amount of money will fairly compensate Ms. Scott-Harris for her injuries?

THE FOREPERSON: \$156,000.

THE CLERK: Thank you.

As to Page 4, damages, punitive, Question 12. If you answered Question 7 yes, has Ms. Scott-Harris proven that Ms. Roderick acted maliciously or with reckless indifference to her rights for which punitive damages are warranted? How did the jury answer, yes or no?

THE FOREPERSON: Yes.

THE CLERK: Question 13. If so, what amount of punitive damages do you award?

THE FOREPERSON: \$15,000.

THE CLERK: Question 14. If you answered Question 10 yes, has Ms. Scott-Harris proven that Mr. Bogan acted maliciously or with reckless indifference to her rights for which punitive damages are warranted? How did the jury answer, yes or no?

THE FOREPERSON: Yes.

THE CLERK: Question 15. If so, what amount of punitive damages do you award?

THE FOREPERSON: \$60,000.

THE CLERK: Mr. Foreperson, so say you on your oath that this is the verdict?

[p. 9-8] THE FOREPERSON: Yes.

THE CLERK: And members of the jury?

THE JURY: Yes.

THE COURT: I would like to see the attorneys for one second about one question on the verdict form.

## (CONFERENCE AT THE BENCH AS FOLLOWS:

THE COURT: The concern I have is that the plaintiff had requested we divide Question 1 and 2 into two questions. I'm a little worried about the way we worded Question 1, which had solely to do with the question of race, and might be viewed as inconsistent with Question 3.

In other words, what they clearly have found is that the substantial and motivating factor in the elimination of the position of Administrator, Health and Human Services was protected speech. Yet, in Question 1 they've said that their reason was a valid reason. Now, in fairness to the jury - do you see what I'm trying to say, Mr. Schwartz? In other words, when I recharged them it was the substantial motivating factor, they said they didn't prove that the budgetary reasons weren't a substantial motivating -

MR. SCHWARTZ: I don't see any inconsistency.

THE COURT: I'm a little concerned. I think it's fine, but I just don't want this ever to come up later as [p. 9-9] the issue I'm dealing with. They are saying plaintiff hasn't proven the reason given was not the true reason.

MR. SCHWARTZ: Okay.

THE COURT: Since the reason they gave was budgetary, how can No. 3 be true?

MR. ASSAD: Correct.

THE COURT: If you see what I'm trying to say, the way we worded this forced them into this position, and I would like to tell them to go back upstairs, that this

is potentially inconsistent, and I want them to go to Question No. 2. Because if they found it was budgetary and that was the real reason, they can't answer this in this way.

MR. FULTON: I don't want them to go to two again, they can go to three again.

THE COURT: No. They answered this yes, and they still have to go to this one and answer no. Do you see what I'm trying to say?

MR. SCHWARTZ: You want them to answer Question 2?

THE COURT: Right. And I think they also have to decide. I think it is inconsistent if they say yes this was the reason given but it was also for them to come and say it's the First Amendment.

MR. SCHWARTZ: They might have been confused by the answer to the question.

[p. 9-10] THE COURT: But I think we don't want this on appeal, we don't want it. Maybe you want it. But I think I have to ask them to go back and ask them - there is an inconsistency or at least someone can construe it as such.

MR. SCHWARTZ: How do we clarify it?

MR. FULTON: The one thing that is consistent, the racial aspect is out. So why should they go back and -

THE COURT: If you are willing to concede that 1 and 3 is not inconsistent.



What do you want to do, Mr. Schwartz, I have a concern there?

MR. SCHWARTZ: I don't see it as being inconsistent.

THE COURT: If everyone agrees it is not inconsistent.

MR. ASSAD: We definitely see it as inconsistent.

THE COURT: Then I'm going back to them.

MR. ASSAD: As to what issue?

THE COURT: I'm going to say they clearly felt she was retaliated against for the exercise of her First Amendment rights. The way we worded 1 and 2, because I forced them to split it up.

MR. SCHWARTZ: At my request.

THE COURT: They were forced into the position of [p. 9-11] answering the race question in Questions 1 and 2 in a way that could be potentially construed inconsistent with 3.

MR. SCHWARTZ: How can we clear this up, then?

THE COURT: I'm going to tell them to go back and re-answer these. To say you can't say the reason was budgetary and then say the reason was First Amendment.

What they could say, it wasn't race, it was speech.

MR. ASSAD: Not with a "no" on budget. If No. 1 is answered the way it is, it's the end of the case.

THE COURT: They clearly felt something was wrong here given the rest of this verdict form and that would not be reflecting the intent of this jury. To clarify any inconsistency, I'm going to have them come back.

MR. FULTON: And do what?

THE COURT: Say this is an inconsistent verdict, 1 and 3, and tell them to redo it, and then you can save your appellate rights. It's clear, I don't want this going up this way, which it will.

MR. SCHWARTZ: A "no" and a "yes" there are consistent.

THE COURT: Exactly right.

MR. ASSAD: Judge, if I may say, if their reason is "no" for Question 1 and they believe she did not disprove the real reason we did things is budgetary, this case is over.

[p. 9-12] THE COURT: That's right, but I'm not sure they felt that given how they answered the rest of the questionnaire.

MR. SCHWARTZ: They could certainly have found, say, the evidence was even on Question 1 -

THE COURT: No, because if they found a substantial motivating factor was budgetary, they can't answer 3 this way, they can't.

MR. SCHWARTZ: They could have found nothing.

THE COURT: They didn't say that, they said unanimously no.

MR. SCHWARTZ: What they could have found was that she did not prove it was budgetary to answer Question 3 as "yes."

THE COURT: Well, I think what I would like to do is - I don't even know if I have an extra copy of the verdict form.

THE CLERK: Mine is pencilled.

THE COURT: Maybe I should send them upstairs and talk about this a little bit with you about how to handle this appropriately, do you agree with that?

MR. SCHWARTZ: Sure.

... END OF CONFERENCE AT THE BENCH.)

THE COURT: Let me explain a concern I have about a [p. 9-13] potential inconsistency between two answers, and that's Question 1 and Question 3. So what I want to do is talk to the attorneys for a second to make sure this never becomes an issue that is wrong to instruct you to clarify whatever the potential inconsistency is and as soon as I have done that, I will let you clarify this as the jury. I'm sure you have some strong feelings as to how this should come out. Why don't we stand in recess for one second.

(Whereupon the jury left the courtroom at 4:11 p.m.)

THE COURT: Come on up here so we can do this without as much pressure.

(CONFERENCE AT THE BENCH AS FOLLOWS:

MR. SCHWARTZ: Judge, I think we should try to clarify it just so we don't have to deal with it on appeal

so we will at least have a clearer recorded [sic] on appeal. I don't see them being necessarily inconsistent.

THE COURT: Maybe I should leave it where it is.

MR. ASSAD: I ask you on behalf of Ms. Roderick that it be declared an inconsistent verdict.

THE COURT: If it is inconsistent, I will send it back to them.

They feel she was retaliated against based upon a First Amendment exercise of rights - I wouldn't want anyone to argue, which I think none of us foresaw, but which is a [p. 9-14] totally fair way of approaching [sic] this - is the way they answered No. 3.

MR. ASSAD: Judge, if that jury which spent so much time on Question 1 asking you to repeat a jury instruction felt that the City's response was that the reason was budgetary and they spent a great deal of time on that, that that was a clear decision on their part. I'm asking this verdict be thrown out as being inconsistent and a mistrial be declared.

THE COURT: Denied. I'm going to give it back to them.

The only thing is I'm thinking it's possible they can find there are two substantial motivating factors in the decision.

MR. FULTON: The instruction that we agreed to and that you gave in Question 1 was after their Question that you spoke about "the" not "a," the motivating



and substantial cause, and you were very specific about that.

THE COURT: Right.

MR. FULTON: Three talks about "a substantial cause," there is an inconsistency.

MR. SCHWARTZ: But they didn't object to the phrasing.

MR. FULTON: I'm not objecting to 3.

THE COURT: This phrasing comes right out of Mount [p. 9-15] Healthy.

MR. FULTON: To answer 1 "no" based on the instructions that they got, they have to find that the reason we gave was the substantial motivating cause - reason, not cause.

MR. SCHWARTZ: No, they don't have to find that it was. They have to find that she didn't prove that it wasn't.

MR. ASSAD: Since it was not the true reason. It can't get much clearer than that.

MR. FULTON: But we changed the question with your instruction.

MR. MARCHAND: You can't have two substantial motivating factors. One has to govern the other. If she hadn't kicked out our reason for the budget -

MR. ASSAD: That's it.

MR. MARCHAND: She's gone.

MR. SCHWARTZ: They have to make a decision as to whether or not they want to go back.

THE COURT: I'm not going to declare them inconsistent and declare a mistrial.

MR. FULTON: My objection.

MR. ASSAD: Note my objection, your Honor.

MR. MARCHAND: And mine.

THE COURT: Now let's find out in the interest of [p. 9-16] justice to find out what this jury believes. The problem is that there are slightly different standards under the First Amendment and under the way the Title VII standard is applied to 1983 actions are used. Now that we've gotten over and you preserved your objections, what is the fair way with all objections preserved, what is the fair way to preserve the record on this? Maybe Mr. Schwartz has a suggestion.

MR. SCHWARTZ: I would hate to send them back with another question to answer, that's the problem. They didn't answer Question 2. I suppose they would answer that one as "no."

MR. FULTON: I'm against them going anywhere near Question 2 for any reason.

THE COURT: Well, they've clearly said the only reason they didn't answer No. 2 is because they weren't allowed to. In their verdict sheet they marked off two and crossed it off, because they were obviously following what my instructions were

MR. SCHWARTZ: And with the individuals answered "no" to the race question.

THE COURT: They consistently answered "no" with respect to the race question. There's the First Amendment decision. I'm happy to leave it the way it is if you are all happy. Let's go off the record.

[p. 9-17] (Discussion off the record.)

... END OF CONFERENCE AT THE BENCH.)

(Whereupon the jury entered the courtroom at 4:26 p.m.)

THE COURT: Let me tell you about what my concern is, and it's a potential inconsistency that I didn't foresee but as I recharged you, remember, on how to answer Question No. 1 - I would never want this issue to go up on appeal - so to clarify the record, I'm going to ask you to fill in a second special verdict form and let me tell you what my concern is. Remember I told you if Ms. Scott-Harris proved that the substantial motivating factor was not budgetary, then you answer "yes," remember, I used the substantial motivating factor analysis.

For you to answer Question 1 and 3, you said she didn't prove it wasn't budgetary, but then you said she proved it was the First Amendment that was the substantial motivating factor. That is potentially inconsistent. If the reason was budgetary, then how could it be retaliation for the exercise of First Amendment rights? So I want you to go back through this. If the true reason for the elimination of the position was budgetary, then you answer Question 1 "no" - let me strike that.

If she's proven that the reason given by the City [p. 9-18] of Fall River was not the true reason, the answer is "yes," and that would be consistent with Question 3.

If you find that she didn't find that the sole reason was budgetary, and you answered that "no," how can you then say in Question No. 3 that the substantial and motivating factor was retaliation for First Amendment rights? I'm concerned about that potential inconsistency there.

What I want you to do is go back and answer Question 1. Did she prove that the reason given by the City of Fall River was not the true reason? Answer that either "yes" or "no," and you answered it "no," which is fine, if you think the answer is they really did eliminate it for budgetary reasons, that's totally within your realm as the jury to decide that. But then you need to rethink how you answered Question No. 3. You would need to change your answer to Question No. 3.

However, if you think that the real reason wasn't budgetary but retaliation against First Amendment rights, then you need to answer that Question No. 1 "yes" and then move on to Question No. 2, which is did she prove intentional racial discrimination. I'm hoping that I'm being clear as to what the potential inconsistency is. Now, Mr. McManus, you're the foreperson for the jury. What is inconsistent is No. 1 and No. 3.

[p. 9-19] THE FOREPERSON: I understand.

THE COURT: What I'm going to do, I'm going to give you back your original form but don't touch it. I'm going to call this the revised special verdict form so there is a full appellate record. I want you to go back and think about it. Has she proven that the real reason wasn't budgetary? If the answer is yes, then go on to Question 2. If the answer is "yes to Question 2, go on to Question 3.



If, however, you find that the real reason was budgetary, then you can't then answer Question 3 yes.

Does anyone want to see me up here?

MR. FULTON: I do.

(CONFERENCE AT THE BENCH AS FOLLOWS:

THE COURT: I know you are preserving your objection to sending it back. I wanted to make sure I stated it fairly and clearly.

MR. FULTON: Now we have three answers, the real reasons, the true reasons, and the substantial motivating factor.

THE COURT: Well, you all agreed to that. That's basically . . .

MR. FULTON: You're not giving them the real reason, the true reason.

THE COURT: The real and true reason are the exact same things. That's a nit pick.

[p. 9-20] MR. FULTON: No, it isn't.

THE COURT: But the issue with the substantial motivating factor is the recharge we all agreed to.

MR. FULTON: Oh, I agree with that.

THE COURT: I'll incorporate. That's why I incorporated that charge into the recharge. I have given you basically a second bite of this apple. Really, I don't want to be substantively wrong. Did I say anything that is wrong other than my clerk raised I do have the discretion as a judge to send it back, but is there anything substantively that I said wrong?

MR. SCHWARTZ: I'm content.

THE COURT: Okay. He's the one that stands to lose, they could go back and wipe this whole thing out.

MR. SCHWARTZ: I know that.

. . . END OF CONFERENCE AT THE BENCH.)

THE COURT: If you have any questions about what I just said, send me down a note.

(Whereupon the jury left the courtroom at 4:31 p.m.)

[p. 9-21] (The following is in the conference room.)

THE COURT: The jury has asked a question concerning the possible conflict between Question No. 1 and No. 3. I have drafted an answer which everybody agrees is substantively correct although the defendants reserve their rights with respect to my decision to send it back to resolve the potential inconsistency.

My answer is: You must decide whether plaintiff has proven that her protected speech was a substantial or motivating factor in the City's decision to eliminate the position of Administrator of Health and Human Service [sic]. If the budget was the substantial motivating factor in the decision to eliminate the position, you must answer Question 1 "no." If you answer "no," go no further. Sign and date the form.

If speech was the substantial motivating factor in the decision, you must answer Question 1 "yes." Then proceed to Question 2 and the remainder of the verdict form.

Plaintiff preserves his rights in arguing that Question 1 and 3 of the original form are not inconsistent and this

to some extent draws a conflict between the standard in Mount Healthy, which is a substantial motivating factor as opposed to the "but for" standard in Title VII which is picked up in Section 1983, and the phrasing we used came out of the St. Mary's case which are Questions 1 and 2 [p. 9-22] which are the employment discrimination claim [sic].

To resolve any possible concern later on, I in my discretion have decided to send it back to the jury to make it clear what they are doing. Does anybody want to add anything?

MR. SCHWARTZ: I agree with that.

MR. MARCHAND: Agree.

THE COURT: Does anybody disagree?

MR. ASSAD: No.

MR. FULTON: No.

(Recess.)

[p. 9-23] (Whereupon the jury entered the courtroom at 5:19 p.m.)

THE CLERK: Would the members of the jury panel please remain standing.

Mr. Foreman, have you agreed upon a unanimous verdict?

THE FOREPERSON: Yes.

THE CLERK: You may return the verdict.

THE FOREMAN: Do you want both of them?

THE COURT: Yes, definitely.

THE COURT: All right.

THE CLERK: Mr. Foreman and members of the jury, the jury makes the following answers:

Question 1. Has Ms. Scott-Harris proven that the reason given by the City of Fall River for the elimination of the position of Administrator, Health and Human Services was not the true reason? Answer: Yes.

Question 2. Has Ms. Scott-Harris proven that the real reason of the City of Fall River for the elimination of the position of Administrator, Health and Human Services was intentional racial discrimination? Answer: No.

Question 3. Has Ms. Scott-Harris proven that her protected speech was a substantial or motivating factor in the City's decision to eliminate the position of Administrator, Health and Human Services? Answer: Yes.

Question 4. Has Ms. Scott-Harris proven that the [p. 9-24] elimination of her position by the City of Fall River proximately caused her injuries? Answer: Yes.

Question 5. Has Ms. Scott-Harris proven that Councilwoman Marilyn Roderick voted to approve an amendment of city ordinances which would have the effect of eliminating the position of Administrator, Health and Human Services with the intent to terminate the plaintiff's employment because she is black? Answer: no.

Question 6. Has Ms. Scott-Harris proven that her constitutionally protected speech was a substantial or motivating factor in the vote of Fall River City Councilwoman Marilyn Roderick favoring amendment of city



ordinances which would have the effect of eliminating the position of Administrator, Health and Human Services? Answer: Yes.

Question 7. Has Ms. Scott-Harris proven that the act of Councilwoman Marilyn Roderick in voting favorably toward the amendments was the proximate cause of the elimination of the position? Answer: Yes.

Question 8. Has Ms. Scott-Harris proven that Mayor Bogan recommended an amendment to city ordinances which would have the effect of eliminating the position of Administrator, Health and Human Services, with the intent to terminate the plaintiff's employment because she is black? Answer: No.

[p. 9-25] Question 9. Has Ms. Scott-Harris proven that her constitutionally protected speech was a substantial or motivating factor in the recommendation by Daniel Bogan, then mayor, of the amendment of city ordinances which would have the effect of eliminating the position of Administrator, Health and Human Services? Answer: Yes.

Question 10. If you answered yes to Question 8 or 9, do you find that the act of Mr. Bogan in recommending the amendment was the proximate cause of the elimination of the position? Answer: Yes.

Question 11. If you answered Question 4, 7 or 10 yes, what amount of money will fairly compensate Ms. Scott-Harris for her injuries? Answer: \$156,000.

Question 12. If you answered Question 7 yes, has Ms. Scott-Harris proven that Ms. Roderick acted maliciously or with reckless indifference to rights for which punitive damages are warranted? Answer: Yes.

Question 13. If so, what amount of punitive damages do you award? Answer: \$15,000.

Question 14. If you answered Question 10 yes, has Ms. Scott-Harris proven that Mr. Bogan acted maliciously or with reckless indifference to her rights for which punitive damages are warranted? Answer: Yes.

Question 15. If so, what amount of punitive damages do you award? Answer: \$60,000.

[p. 9-26] So say you Mr. Foreman and all members of the jury?

THE JURORS: Yes.

THE COURT: All right. You've worked hard and I thank you very much for your service. You can now talk about the case with whomever you want to talk about the case. However, there are certain people who are in the press that are interested and have the right to get your name and address. The attorneys and the parties should not contact you. You have a right to say no to the press and you have a right to say yes in the press. There has been coverage in the Fall River area but not really up here. So I don't know. But the parties and the counsel should not get in touch with you unless they do it under my auspices, so I want you to know that.

You can certainly talk with anyone about the case. A lot of you probably went into this with very candid feelings of your belief on things. I want you to remember that it is important that you protect the confidentiality of your deliberative process.

I also make it a practice to go upstairs and personally thank you. It is 5:25. I asked you to go back upstairs. But

for those of you who would need to go, I won't be insulted. For those of you who should want to speak with me, I will be glad to speak with you, and we will now stand in recess.

[p. 9-27] (Whereupon the jury left the Courtroom at 5:25 p.m.)

THE COURT: I will see counsel on the record for one second.

(CONFERENCE AT THE BENCH AS FOLLOWS:

THE COURT: A couple of things. There was some question with what I did with respect to the question of directed verdict. I can't remember what I did. I know I allowed it with respect to Mr. Connors. What I can't remember is whether I reserved on it or whether I denied it without prejudice. But for the record, whichever approach I took I will resolve in post-judgment motions the issues with respect to the claim of legislative immunity and the claim of proximate cause i.e. whether there was enough evidence to go to the jury on the majority of the City Councilors' voting. I can't remember which tack I took, but for your rights I want to protect it.

As to post-judgment. You need to get me some amounts on attorneys fees. When can you do that?

MR. SCHWARTZ: The end of next week.

THE COURT: Could another week do it for you to decide whether you want a hearing?

MR. FULTON: Sure.

THE COURT: I will give you another week after that. Then we can enter judgment and you can file the

[p. 9-28] appropriate post-judgment motions. I just want to make it clear as to how we are to proceed and I want to make sure your rights are protected.

MR. FULTON: That's what my concern was.

THE COURT: Anything else?

MR. ASSAD: I want to renew my motion for a mistrial at this time.

THE COURT: On the inconsistencies?

MR. ASSAD: Yes.

THE COURT: I understand that. But I think at this point, and I think it was clear all along what they were trying to say. I just didn't want - there are enough serious legal questions without there being that inconsistency floating around. Now I think it is clear what they were doing.

. . . END OF CONFERENCE AT THE BENCH.)

(Whereupon the trial was concluded.)

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UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

JANET L. SCOTT-HARRIS

V.

CITY OF FALL RIVER, ET AL

Civil Action  
No. 91-12057-PBS

Courtroom No. 6  
Federal Building  
Boston, MA 02109  
2:15 p.m., Thursday  
September 29, 1994

Before: THE HONORABLE PATTI B. SARIS, District  
Judge

Hearing

Marie L. Cloonan  
Federal Court Reporter  
1690 U.S.P.O. & Courthouse  
Boston, MA 02109 - 426-7086  
Mechanical Steno - Transcript by Computer

APPEARANCES:

Schwartz, Shaw & Griffith, (by Harvey Schwartz,  
Esq. and Siobhan M. Sweeney, Esq.), 205 Portland  
Street, Boston, MA 02114, on behalf of the Plaintiff.

Long, Racicot & Bourgeois (by Stephen C. Fulton,  
Esq.), 200 State Street, Boston, MA 02109, on behalf  
of the Defendant, City of Fall River.

Driscoll, Marchand & Boyer (by Robert Marchand,  
Esq.), 206 Winter Street, Fall River, MA 02722, on  
behalf of the Defendant, Daniel Bogan.

Bruce Assad, Esquire, 10 Purchase Street, Fall  
River, MA 02720, on behalf of the Defendants,  
Marilyn Roderick and John L. Connors.

[p. 3] THE CLERK: The Court calls Janet Scott-  
Harris v. City of Fall River, 91-12057.

THE COURT: Good afternoon. All my old  
friends are here.

MR. FULTON: Hello, Judge.

THE COURT: It's been a while. State your  
names.

MR. ASSAD: Bruce Assad, your Honor, repre-  
senting Marilyn Roderick.

MR. FULTON: Stephen Fulton. I represent the  
defendant, City of Fall River.

MR. MARCHAND: Robert Marchand, repre-  
senting Daniel Bogan, the defendant.

MR. SCHWARTZ: Harvey Schwartz, for the  
plaintiff.

THE COURT: Now, I have read all the motions  
and I think it was a combination of a lot of people's  
vacation plans over the summer which postponed it now  
until September. I apologize for that. It's just every time  
we tried to find a date, someone couldn't do it.

THE CLERK: It was our schedule, too.

THE COURT: Our schedule as well, I think,  
because of the cases we had over the summer. It's a

combination of all our schedules, and I meant myself, as well, included.

Here we are in September and the issue is going to be whether or not I should grant a JNOV or a Motion for a New Trial.

[p. 4] I have read all the pleadings. And I wanted to start with you all and ask – who would like to take the lead on this?

MR. ASSAD: I would, your Honor.

THE COURT: All right.

MR. ASSAD: Did you have questions, Judge, or do you want us to make a presentation? You mentioned, I thought, that you had questions for us or –

THE COURT: Yes.

I understand you are preserving for the record the issue of legislative immunity. But I believe the First Circuit – you're actually asking me to change First Circuit law on the subject. I understand you're preserving it so you can go up there and ask them to change.

MR. ASSAD: Judge, I would go one step further than that. If you take a look at the jury slip that was initially brought to you, in terms of what this jury had felt about whether or not Janet Scott-Harris was able to prove that the true reason for the city, being the budget, was that true or false, when they responded, Judge, they responded that she failed to prove her case and that the city's statement that it was a budgetary cut was in effect.

THE COURT: Excuse me, wait, wait. That's another issue all together.

You urged me prior to trial to find as a matter of [p. 5] law, regardless of the facts, of what the jury said –

MR. ASSAD: That's correct.

THE COURT: – that there was legislative immunity.

MR. ASSAD: That's correct.

THE COURT: But you agreed it was a fact dispute under First Circuit law, but you were telling me that the First Circuit was against the weight of the authority in the other circuits and you were essentially just preserving that issue.

MR. ASSAD: That's correct.

THE COURT: So on that issue, I'm assuming you are just doing the same thing again.

MR. ASSAD: Judge, we are preserving the issue. But it does go a step further. I think we now fit within the First Circuit cases.

THE COURT: Listen, on that verdict slip, we all agreed, all of us, we sat back there in that room and we all agreed that is how it should go in, there were going to be the first two questions on the Title VII issue and the next on the First Amendment issue. We all agreed that under St. Mary's we had to ask these questions in a certain way and then we had to ask them in a different way because it's phrased differently under Mount Healthy for the First Amendment. Right?

When it came back, there was an inconsistent [p. 6] verdict.



MR. ASSAD: Correct.

THE COURT: I instructed them without objection on your part that I was instructing them inaccurately, that it was inconsistent. You objected to my sending it back at all.

MR. ASSAD: That's correct.

THE COURT: But you didn't say the instruction of law was wrong. You all agreed it was inconsistent. That was my memory. I sent them back and put it both ways. It's either they have not proven it, in which all of these answers have to be no, or you can answer that they have not proven that it was - that they have proven it wasn't budget, but they haven't proved it was race; and then I allowed them to go on to the next question.

You may disagree that I should have sent it back, but everyone agreed it was an inconsistent verdict.

MR. ASSAD: That's correct, Judge.

THE COURT: That's right.

So I was a little taken with the arguments that I had to follow the first verdict slip since everyone agreed that both sets of answers couldn't be right.

MR. ASSAD: That is correct.

THE COURT: So? When I sent it back, they clarified it and here I am. I think there are some great [p. 7] constitutional issues here, but that's not one of them.

MR. ASSAD: Judge, our feeling was and I stand to be corrected - my understanding was we felt, at least for the defense attorneys, that after that first question, we

took a look at the fact it was inconsistent. We took a look at the question, itself. If, in fact, this jury says this is a budgetary reason, this case is over.

THE COURT: But we said it was inconsistent. We said just that, if it's budgetary, it's over. If it's not, then go on and answer the other questions.

MR. ASSAD: That opens up a whole new area of why they would have rendered a verdict in favor of Janet Scott-Harris with respect to money damages.

What that reason was, was the fact that they felt sympathy toward Janet Scott-Harris. They disliked Daniel Bogan, they disliked Marilyn Roderick, none of which is relevant to the case. The case stands, Judge, as you correctly instructed the jury. They must have found the majority of the city councilors -

THE COURT: I agree that's moving to where I think the tough question is.

MR. ASSAD: All right. We'll talk about that.

THE COURT: That's where I'm going to press Mr. Schwartz hard and that's where I think the issue is.

The question is, in my mind, legislative immunity [p. 8] as an absolute immunity is out as to First Circuit law.

The question is: Was there enough evidence in this record from which the jury could find that retaliation for exercise of First Amendment rights was a substantial or the motivating factor in the decision of the City of Fall River defined as the mayor and a majority of the city council.

MR. ASSAD: Fine.

THE COURT: I don't think anyone had a legal question as to how I sent it to them.

MR. ASSAD: No.

THE COURT: I don't remember that, anyway. I think we all agreed on that. But there was a serious disagreement about whether there was enough evidence from which the majority of the city council - you could conclude that from a majority of the city council. That's what I want to hear about today.

I reread your papers. And I understand that it's fair game to preserve your point on legislative immunity. I think I'm bound by First Circuit law. I think there is a recent case in the last couple of months on this reaffirming that position and I'm just going to stay with it.

But let me ask you this -

MR. ASSAD: Yes.

THE COURT: - if I can play the devil's advocate a little bit. In fact, I think there was enough evidence from [p. 9] which a jury could find that Mr. Bogan and Ms. Roderick were impermissibly motivated on the First Amendment issue. At least I'm not going to change the jury verdict on this. Drawing all evidence in favor of the plaintiff, there was enough there.

But the tough issue is: Is that enough from which you can infer something about the majority of the city council?

But let me ask you this. These aren't just crazies off on the fringe of a city council. These aren't like one city

councilor spouting racism, an improper thing. This was the mayor and the chairman of the ordinance subcommittee. Am I correct? And the vice chair of the city council?

MR. ASSAD: That's correct.

THE COURT: Given that and the newspaper coverage that we read about and the fact that at least one councilor called her and said, "What's going on here?" is that enough from which I can infer that they knew the issues and they voted accordingly?

I'm going to push it the other way for Mr. Schwartz. That's really the tough issue here.

MR. ASSAD: Judge, in the City of Fall River, you have nine city councilors elected at large. The fact that you get [sic] are able to get any two to agree on a lunch time is a real coup for anyone.

[p. 10] Each one was an individual. The fact that you may be president of the city council or you may be a vice president of the city council has no bearing on influence within that city council whatsoever. All it means is who conducts the meeting and who speaks last at a city council meeting. That is it in the City of Fall River.

With respect to this case, Judge, unless I tell you today who the members of the city council are that voted against the keeping of that position, unless you read the first complaint, Judge, you don't know who they are. They weren't even mentioned.

As a matter of fact, the only names that were mentioned were Michael Plaskey [sic] in passing, and John Alberto. Absolutely no evidence as to those two. And the only other councilor was Raymond Mitchell. And it was



mentioned by Marilyn Roderick that she had a conversation with him and that's it.

Judge, for all this jury knew, you could have been a member of the city council that voted on this issue. There was absolutely no evidence

THE COURT: Right now, I don't think I could get elected to anything in Fall River.

MR. ASSAD: Neither would I, Judge.

But, your Honor, in this particular case, they had no idea who they were talking about, whether they were male, [p. 11] female, black, white or yellow, no idea whatsoever.

In fact, Judge, if you take a look at the original complaint, I believe they have listed as defendants John Mitchell, Michael Plaskey [sic], John Alberto, Leo Pelletier.

And if you notice on the record, Judge, not even the plaintiff believed they had a shred of evidence against them because they voluntarily dismissed all of them prior to trial. You heard not one shred of evidence about any of them during trial.

As a matter of fact, Janet Scott-Harris testified that she had absolutely no knowledge that Marilyn Roderick or Bob Connors or Dan Bogan talked to any city councilor about the elimination of her position or the elimination of the department itself, nor did you hear her say that she had any evidence, any personal knowledge, that Marilyn Roderick, Dan Bogan or Bob Connors interfered with the disciplinary proceeding with respect to one, Dorothy Biltcliffe, and that was supported by Sharon Skales [sic], who

also testified here at trial. So what you have is an absolute void as to what was in the mind of anybody other than Marilyn Roderick, Dan Bogan and Bob Connors. And Bob Connors didn't even get to the jury.

THE COURT: Well, that's right.

MR. ASSAD: You have absolutely no information about anyone else. And to make the leap, to say that these [p. 12] people felt the same way as you would say Marilyn Roderick would have felt or Dan Bogan would have felt, looking at the evidence in the absolute best light to the plaintiff, is a pretty broad stroke, Judge, and it is a statement that all councilors think alike, all councilors would be, in effect, in this particular instance, morally corrupt. And I don't think the Court can do that.

I know the jury didn't have any information as to these people. The jury didn't even know their names on the majority of the city council, let alone what was their substantial or motivating factor in their vote.

THE COURT: Do you have any case law that would even be on point on this?

MR. ASSAD: Judge, you know, I defer to my brother if there's anything. I don't know of any case law that says if there is an absolute void in the evidence, how do you make the leap? There is nothing. They don't even know the names, Judge.

THE COURT: I'm going to ask Mr. Schwartz. They do know that there was a swirling controversy around this woman, because we heard it was in the press.

MR. ASSAD: Judge, that's correct. The date, when they had the meeting, there was a controversy, there was a - I don't know about a swirling controversy.

THE COURT: She said she was crying, she was [p. 13] irritable, her kid was embarrassed at school. What I don't know and I'm not sure about were any press articles introduced into evidence or discussed that would at least bring this controversy to the councilors' attention?

MR. FULTON: What you're talking about, your Honor, if I can interrupt, there were none in evidence. All those articles she discussed was after this had happened.

THE COURT: I didn't remember the timing. I was going to ask about that.

MR. ASSAD: Those were the statements, Judge, she related to. I asked her about the article of Sean Flynn and Mike Mello. Those were subsequent to the vote.

THE COURT: All right.

MR. ASSAD: Judge, I don't know if you want me to get into what our feeling is about the inconsistent jury form.

THE COURT: Yes, I would, a little bit. We all agreed it was inconsistent. I think part of it was our fault because we instructed them, the first two questions were the St. Mary's question on Title 7 and the next question was the Mount Healthy question. And I think none of us saw the potential for them answering it in an inconsistent way.

You know, it is all of our fault, but it happened. And I think it would have been error not to have sent it [p. 14] back. Am I wrong that the correct thing to do about an inconsistent verdict is to send it back and tell them to do something about it?

MR. ASSAD: Or to grant a new trial, Judge.

Judge, this jury, if you recall, the first day you sent it out, I think, the first comment you said to them, "Don't make any determination as to why Bob Connors is not in here." We weren't out the door when they had their first question, "Why wasn't Bob Connors in here?"

THE COURT: Right.

MR. ASSAD: Then, a little later on, they sent you a question. And the question related to the first question, they were having difficulty, they were talking and thinking about the first question. They were trying to come to a conclusion before they went on. I think they might have even sent two questions on that first day, Judge. But I stand corrected. We weren't able to get the reporter at this time.

THE COURT: I understand. You probably read in the press we're doing a pretty major trial. There is a lot of daily copy going on.

MR. ASSAD: Absolutely, yes.

But, Judge, they spent a good long time on that issue. What happened when they came back with the inconsistent verdict that they did come back with, you [p. 15] recharged them. They went out and the first thing they did, Judge, is they sent another question down to us, asking us, "Why do we have to change our answer in the first question?"

And, Judge, they believed that it was a budgetary situation. They believed that Janet Scott-Harris didn't prove otherwise in this Court.



What they did, when we sent back a written instruction back to them, within five minutes, they were down saying that they had to do either one or the other. They changed it within five minutes. They walked down and presented it to this Court.

Your Honor, it was an inconsistent jury verdict. It's absolutely a classic case for a new trial. This jury, at that point in time, I question as to what was going through their minds when they changed that slip in five minutes, something that took them hours over a two-day period, to figure out in Question No. 1.

THE COURT: I can assure you I'm not going on that. But the bigger question, the more important question, I'm going to turn to Mr. Schwartz, unless the two of you do you have anything you wanted to add?

MR. FULTON: I'll just say a few things, your Honor.

Mr. Assad has stolen all my thunder.

MR. SCHWARTZ: Not for the first time.

[p. 16] MR. FULTON: Not for the first time is right.

I think you have the issue, and it deals with this majority thing, and I won't belabor the point, but I don't think there is enough, even as to Bogan, that he knew who this Dorothy Biltcliffe was and then, afterwards, he brought back Mrs. Biltcliffe before her full suspension had been served.

But the key is whether he initiated all this renovation to the city government for the purpose of eliminating Janet Scott-Harris.

What it comes down to, he knew who Mrs. Biltcliffe was; even Mrs. Scott-Harris had no problem with Bogan, and he had no problem with her.

How we get from there to both a verdict against the city and punitive damages against Mr. Bogan, I have no idea. But you asked for some case law, and I'll just give you this case.

This deals with a racial discrimination case and we're now talking about a First Amendment case. This dealt with examining the motives of certain members of a board who voted one way. Pildich [sic], P-i-l-d-i-t-c-h, v. City of Chicago, 3 F.3rd, Page 1113, Seventh Circuit, 1993.

I have not been able to find any case which very clearly on point says that where an action is taken by a major [sic] and a city council there has to be, you know, inquiry [p. 17] into the motives of a majority of the city council, but that is going to be our position in this case, even though there may not be any decision out there that's reported.

THE COURT: Because, and I'll go to Mr. Schwartz in a minute - he's at the edge of his chair - there really was almost no evidence at all to suggest what was in the minds of the majority of the city council. So the question in which you raise whether or not it was the fact it was the mayor and the vice chair of the city council is enough to make it a substantial and motivating factor. That's the legal question.

MR. FULTON: That's right. Is that enough? The identity of the two that the jury did not like, is that enough to impute that motive over to all the others who we know nothing about?

THE COURT: That's the difficult question.

MR. FULTON: That's what it is.

THE COURT: Okay.

MR. FULTON: And we say you can't do that. And I imagine they will say you can.

THE COURT: Mr. Marchand, is there anything you wanted to add?

MR. MARCHAND: Do I have six minutes, Judge? That's my usual standard, now that these guys have stolen my thunder.

[p. 18] If, in fact, Danny Bogan is the mayor and makes a decision that he made to revamp the city budget, part of that was his action against Scott-Harris up until that point in time.

The plaintiff, really hasn't proven anything against Dan Bogan. The first contact with Bogan comes when he makes this decision in January of 1991. He became the mayor in December, December 21st. And now we start going off on tangents on the budget as to what he's doing.

Mr. Schwartz would have us believe that's an independent action strictly against her, which would allow him to get to the legislative immunity. I'll leave that out.

He made an umbrella decision to do a financial where-withall with the City of Fall River which took place. Up to that, it's not too bad.

THE COURT: In fairness, Mr. Connors put together a list and she is not on it. He made the choice to add her. That's a very specific choice.

MR. MARCHAND: Without objection, without testimony against it, Mr. Bogan and Mr. Connors both testified as to why this contractual person had to be let go before the end of the fiscal year.

THE COURT: I agree there is another side to it, drawing all inferences to him. It was an individualized action. How did it get here?

[p. 19] MR. MARCHAND: How did it get there?

Bogan got to be mayor. He said: Look, you know there's going to be less dough. This is where I'm going to start. I've got to get rid of Scott-Harris in this particular manner.

Mr. Schwartz would have us believe he could have fired her. He could have fired her for just cause. He could not fire her. She was an excellent employee. He said that many times under oath. But that was part of the entire conspiracy action. In and of itself, that is not malicious. There was no evidence to support any maliciousness on Mr. Bogan's part.

Now, we bring in Biltcliffe, Biltcliffe, who he knew maybe ten years ago on a particular advisory board. Mr. Schwartz used the word "strong advisory board." That is a different story. He was on a board with her one time ten



years before this. He testified he knew her and he knew her husband.

Mr. Schwartz would have you believe that there was a certain political connection in the City of Fall River between Mr. Bogan and Tom Norton, the state senator who wrote the letter. Now, maybe that's where the maliciousness comes in. Tom Norton is supposed to know what Danny Bogan told him.

He doesn't write to Danny Bogan. He writes to Bob [p. 20] Connors. Bob Connors is supposed to be the glue. That's what Mr. Schwartz said in his opening. Bob Connors was the glue to put all this conspiracy together. What did he do with Bob Connors? He kicked him out.

What did Bogan do when he got the letter? Did he kick her out right away? No. A month after he got it, he brought her back early. That's it. That's what Bogan did.

There's nothing else. No stories. He did his function as the mayor, as the chief administration officer of a municipality or a town or a state, as you do in your courtroom.

There is no evidence, as counsel said, Mr. Assad said, Mr. Fulton, getting back with rage, with names. No evidence that Bogan went to any city councilor.

That's the issue you've got. That's your job. What evidence was presented, what evidence was presented - who's supposed to present it, Judge? A simple question. Who's supposed to present it? The plaintiff.

What did they put on it? Nothing.

What's the best evidence? Nothing happened between Bogan and the city council.

Who dismissed the case against the remaining city councilors? The plaintiff.

What does that mean? I know what it is. I know what I want you to think it means. There's no case because [p. 21] there was nothing.

Now, if there's nothing and he brought him in initially and he kicked them out because he had no case, he still has no case. He can't prove a connection. He can't prove a nexus. He couldn't do it directly, when he had them. He could have brought them in. He's the plaintiff. He's supposed to prove the case.

THE COURT: He could have brought who in?

MR. MARCHAND: The people he brought as initial defendants, the remaining city councilors.

THE COURT: Okay.

MR. MARCHAND: I hate to use the TV term, "quantum leap," but he wants to use a quantum leap theory to nail them.

THE COURT: All right. I heard all these theories.

You don't disagree as a matter of law because I think everyone agrees that it had to be the mayor and the majority of the city council. At least you didn't object to the jury instruction.

MR. SCHWARTZ: I know, I know. And we kept looking at this as - at least I kept looking at this as a Title VII case with a First Amendment tail to it. What we're left with is the tail. That's where this Acevido [sic] case, this

recent First Circuit decision that I cited in my memo, I thought it was really fascinating, where the First Circuit [p. 22] says: Well, here's the standard of proof of Title VII and here's the standard of proof under the First Amendment.

That's our case. I mean, if we really wanted to confuse the jury, we would have given them both instructions as to who has what burden under the First Amendment [sic] and who has what burden under Title VII. Then they would have really been confused, because, as the First Circuit said, they're very, very different burdens. They're still arguing the Title VII burden here. They're saying I have to prove something.

THE COURT: Well, you do.

MR. SCHWARTZ: Well, under Mount Healthy and under Acevado [sic] I have to prove my prima facie case.

THE COURT: It's a substantial and motivating factor.

MR. SCHWARTZ: Your Honor, yes, that her speech was a substantial or motivating factor behind the decision to eliminate her position. Okay. I have to present a prima facie case.

The burden on the First Amendment [sic] then shifts to them to articulate the legitimate non-First Amendment discriminatory reason. And then the burden stays with them to prove that that was the real reason and that they wouldn't fire her, anyway, even in spite of the First Amendment violation. And that's where the First Amendment [p. 23] -

THE COURT: I don't have it in front of me. We just gave them the ultimate question under the First Amendment.

MR. SCHWARTZ: Under the Title VII formulation, plaintiff bore the burden of proving that the real reason -

THE COURT: Are you saying we made a mistake?

MR. SCHWARTZ: No, no. What I'm saying is that we didn't instruct them fully on the First Amendment burden, because it's a different burden. I made a decision not to do that because it's awfully confusing.

But their burden on the First Amendment count is to prove that they would have fired her anyway and to articulate, they have a burden of articulating the non-discriminatory reasons - what is their nondiscriminatory reason that they articulated.

THE COURT: In any event, the question we put to the jury, I wish I brought it down - maybe you don't have it.

MR. SCHWARTZ: I don't have it here.

THE COURT: Did you prove that the First Amendment retaliation was a substantial and motivating factor?

MR. SCHWARTZ: Right.

THE COURT: And then we asked them the proximate cause issue.

[p. 24] MR. SCHWARTZ: Yes, yes.



I do have it.

THE COURT: What was the question on the First Amendment?

MR. SCHWARTZ: Has Ms. Scott-Harris proven that her protected speech was a substantial or motivating factor in the city's decision to eliminate the position? And they said yes.

THE COURT: All right. When we said "the city," we were talking about - are you saying that we did something wrong in how we charged on that?

MR. SCHWARTZ: No. What I'm saying is she's proven that.

THE COURT: Yes.

MR. SCHWARTZ: They have to articulate a nondiscriminatory reason, the city has to articulate a nondiscriminatory reason. The city did articulate a nondiscriminatory reason, the budget. They didn't articulate different reasons for each councilor. They chose one defense for the city.

THE COURT: And they rejected it.

MR. SCHWARTZ: Right.

THE COURT: But here's the question - maybe I'm getting beyond it. I understand, and I'm not going to reverse the verdict with respect to the individuals. What [p. 25] do I do with respect to the majority of the city council?

MR. SCHWARTZ: If they had come in with different reasons for the different members of the city council voting, then that would have become a fact question. But they only came in with one reason. They came in with one defense and their only defense was money, was finance.

THE COURT: But it could well be they rejected that as to the defendants as two individuals. But it could be that the rest of these city councilors really thought it was a budget thing. They didn't know why it was that they chose one person rather than another person. There is no evidence they did, anyway.

MR. SCHWARTZ: Right. And the way the case was presented to the jury was whether money-saving was a reason, was the reason why the councilors voted to get rid of her.

THE COURT: Right. And what is the evidence that the majority of the city council didn't have money in mind?

MR. SCHWARTZ: Well, the evidence was that it didn't save - the jury could have found that it did not save the city money. That's how I argued to the jury. That's what half of the evidence in the case was. It's going to cost the city more money to get rid of her than to have kept her.

THE COURT: I agree, there was a lot of evidence from which they could have found that that wasn't - the [p. 26] budget wasn't the reason why Mr. Bogan put her on the list or why Ms. Roderick voted that way.

We don't even know what the debate was in the halls of city hall. We don't know whether any city councilor could have been there. They could have been erroneously misled into thinking it was going to save money.

MR. SCHWARTZ: But that wasn't the defense that was presented.

THE COURT: Sure, it was. They said it was budget, right, budgetary?

MR. SCHWARTZ: Yes.

THE COURT: The reason why Bogan and Roderick added her on the list was budget.

And you, because you are an effective lawyer, went through the budget stuff and showed it didn't really save any money. That undercut what the mayor was saying and, to some extent, what Roderick was saying.

But since they were the people precipitating or at least submitting the list, we don't know what they told the city council. We just don't know. The city council could have been like a bunch of -

MR. SCHWARTZ: - sheep.

THE COURT: - sheep, and just said, "Save money. I'm for it."

MR. SCHWARTZ: But what difference would it have [p. 27] made if each of those other city councilors would have gotten up there, just like Bogan, and just like Roderick, and said it was money?

THE COURT: And then, you would have said, "But it didn't save any money." And they would say, "My

God, you are right, Mr. Schwartz, I should never have voted for it."

In other words, if they never heard of the Biltcliffe thing - let's assume they never heard of -

MR. SCHWARTZ: We know one other one did. Mitchell did.

THE COURT: He was the one who called Ms. Scott-Harris?

MR. SCHWARTZ: No, no. Roderick said: I spoke with another city councilor.

THE COURT: So we do know one other, two.

MR. SCHWARTZ: We have two of the eight.

THE COURT: We need three more.

MR. SCHWARTZ: Yes.

THE COURT: What if they were just a bunch of sheep going along with it, duped by these people, who really had a nefarious motive? Then where does that leave us?

MR. SCHWARTZ: Then, they were victims, too, but the action taken by the city that was motivated and proposed would not have happened but for Bogan recommending this to the city council. That action was motivated by, as the jury [p. 28] found, a bad motive.

If Bogan was able to fool the city into taking an action, the city is liable for that. If that's what these councilors want to say, is that "Bogan and Roderick fooled us, gave us wrong numbers," something like that -



THE COURT: What if they said, "We never heard of Biltcliffe in our lives" or "We certainly never heard of it in the context of Scott-Harris. We trusted Bogan and Connors to do the number crunching. They tell us it is necessary, you know, we'll go along with it"?

MR. SCHWARTZ: I think they have to take some responsibility for their votes.

THE COURT: I'm just saying that's the tough legal question for me.

MR. SCHWARTZ: Right.

I think if in every action against a municipality for a civil rights violation taken as part of the public policy or enacted by that body, you have to prove the individual motivation of the majority of the people voting for it, it's really going to -

THE COURT: I think it's a tough burden, I agree.

MR. SCHWARTZ: Yeah. It will eliminate a lot of civil rights cases.

The city is responsible for the action taken by the city. This was not an action taken by nine individuals. It [p. 29] is an action taken by the city to eliminate her. The city came into this court and came up with its justification.

THE COURT: In any legislative body, let's assume there is no absolute immunity. I don't know if the First Circuit would stick with that.

MR. SCHWARTZ: Sure.

THE COURT: In any legislative body, you are bound to have some people with lousy motives. Maybe they want to keep the African-Americans out of the housing project. You know, without mentioning names, we heard comments over time, like in any municipality.

But if the majority are neutrally or benignly motivated, do you hook the city with that, even though a certain subset are voting for the wrong reasons?

Do you see what I'm trying to say?

MR. SCHWARTZ: I see what you're trying to say, but the problem here is that the jury found that the moving force that - but for Bogan making this decision and recommending it to the city council and presenting it to the city council, but for that, it wouldn't have happened.

THE COURT: Okay. But that's a different question. As I was thinking about it, that was the alternative way I had to think about it. I didn't remember any evidence, except possibly the news articles, and I asked about those, from which anyone could infer by a preponderance of the [p. 30] evidence that the majority of the city councilors even knew about it. If there is any, you would have to let me know.

MR. SCHWARTZ: I would really have to agree, because I, myself, have seen plenty of these articles.

THE COURT: Why don't you review? I'll let you supplement for sure.

Let me say for a second, I couldn't think of anything that I reviewed, and I didn't look at every newspaper

article, either, and I remember a couple came in on the issue of damages -

MR. SCHWARTZ: Right.

THE COURT: - as to her grief. Remember, her daughter was so embarrassed. I just don't remember the timing with what, what act, and that kind of thing.

But let's assume for point of view there isn't enough evidence from which you could infer that a majority of the city council voted for impermissible reasons. Are there any cases? Do you have any cases that would say the mere fact of leading people in a legislative body: The mayor, the legal legislation, and the chairperson of the city council, that's enough to get you the causation issue?

MR. SCHWARTZ: So my problem is the first threat or statement. I have never heard raised in a municipality, in a civil rights case before, you have to prove the individual motives of the individuals.

[p. 31] THE COURT: I have never seen a case like this, have you? Has anyone here ever seen a case in which the voting entity on the job decision was a legislative body?

MR. SCHWARTZ: I have two cases. I tried a case before Judge Nelson against the Town of Hull. I have a case before Judge Mazzone right now.

THE COURT: I understand it's against the town, but was it something upon which -

MR. SCHWARTZ: I've got one now before Judge Mazzone, against the Town of Tewksbury, for actions against the board of selectmen.

THE COURT: Have there been any, any appellate decisions on whether or not you have to prove that was a majority of the board of selectmen -

MR. SCHWARTZ: I got a verdict for plaintiffs. It went to the First Circuit. This issue never came up.

THE COURT: Was the instruction the same? That it had to be a majority of the board of the Town of Hull?

MR. SCHWARTZ: No.

THE COURT: Because everyone agreed to that at the time.

MR. SCHWARTZ: No, in the Hull case in the First Circuit, it just wasn't an issue as to what the separate motivations of the different -

THE COURT: Do you have a cite for that?

[p. 32] MR. SCHWARTZ: The Hull case? I cite it in every case I ever do. I don't have it right here. I'll get that.

THE COURT: Do you remember the plaintiff's name?

MR. SCHWARTZ: Yes. Miller against Hull.

THE COURT: We'll find it.

MR. SCHWARTZ: David Miller.

THE COURT: I figured you'd remember the plaintiff's case.

MR. SCHWARTZ: Yes, a great case, with political developments.



THE COURT: For me, this is the legal question for me.

MR. SCHWARTZ: Yes. And I agree, if the plaintiff has to prove the individual motivation of a majority of the city council, it's a hell of a burden.

THE COURT: It is. Doesn't that -

MR. SCHWARTZ: Because these cases normally are proven by circumstantial evidence. I think the jury is entitled to infer that these council members voting on these decisions were aware of the city's finances, they voted on the budget. These people voted to eliminate Janet Scott-Harris' job to save money and they voted to create a job for Dorothy Biltcliffe. Marilyn Roderick agreed to that.

THE COURT: I have no dispute that you disproved [p. 33] the financial basis for it. The question is whether they knew about it or I could reasonably infer they knew about it. Whether that is enough in and of itself to find that it was impermissibly motivated, even if they just sort of rubber-stamped the financial decision without probing more deeply.

MR. SCHWARTZ: The jury certainly could have inferred that Bogan and Roderick presented the elimination of Scott-Harris' job as a money-saver for the city. That's how it was presented to the city council.

Now, the jury also could have inferred that the city councilors were aware of the budget and could have known or should have known that it was not a money-saver.

THE COURT: That, I'm not sure.

MR. SCHWARTZ: Well, as city council members, they certainly should have known that three top positions were empty and that she was filling, she was doing those jobs. You have to expect that they're going to know who the administrators of the city are and who is out on sick leave and who's dead. And if they are presented with the proposal, we're going to save money by eliminating Janet Scott-Harris and hiring these three people, they have to be pretty dumb sheep to be hoodwinked.

THE COURT: You don't have any other federal district or state, supreme or federal court of appeals who [p. 34] really mired through this issue that now the municipalities are people, are viable defendants -

MR. SCHWARTZ: You have to prove each multiple -

THE COURT: - how you go about proving the thing.

MR. SCHWARTZ: Right.

THE COURT: We did some case law research at the time, but it was mostly going to whether it was absolute immunity or not. I didn't see anything in people's briefs that helped me on this or not.

MR. SCHWARTZ: I think what happened, the city came in with one defense. They banked everything that the jury would buy the finance defense.

THE COURT: They admit she was a fine employee. They can't do anything else.

MR. SCHWARTZ: That is their only defense, sure. But they banked everything on that defense and the jury rejected that finances was the real reason.

THE COURT: For those two people, they sure did.

MR. SCHWARTZ: Well, for those two and for the city.

THE COURT: The question is - I agree they did that - was there enough evidence on which they could have done that? I'm struggling with that. I'm just telling you. I don't really know the answer to it.

Because I also worry that - I tell you, it's such [p. 35] a burden to put - it wasn't as if the two people were saying lousy racial comments were fringe elements. They were the mayor - it's almost like a law school example. The chairman of the ordinance committee that was submitting this to the city council. It's a difficult question.

MR. SCHWARTZ: And one other city councilor who Biltcliffe contacted, who the jury could have assumed.

THE COURT: That brings us up to two and you need five to be a majority, right?

MR. SCHWARTZ: Right.

THE COURT: Am I doing the math right?

MR. ASSAD: That's right, Judge.

THE COURT: I'm correct, because the mayor doesn't vote, right, you need a five out of the -

MR. ASSAD: The vote was six to two and they needed five.

THE COURT: All right. We'll take it under advisement.

MR. ASSAD: Judge, may I just respond to one thing?

THE COURT: Yes.

MR. ASSAD: It might help in terms of the argument that was given here in terms of what happens when the mayor sends something to the city council.

By ordinance, the ordinance was introduced here during the trial. For something to happen with respect to [p. 36] the Department of Health and Human Services, the mayor could not do anything on his own, nor could the city council. It needed the mayor to submit it and a majority vote of the city council or nothing happens, Judge, at that point in time.

With respect to the other city councilors, in looking at Janet Scott-Harris and the savings of money, Janet Scott-Harris testified she could do three jobs better than any three people could. And, Judge, the chart that was drawn by Janet Scott-Harris here in this Court showed that she was overseeing three departments.

THE COURT: That cuts in favor of her ability.

MR. ASSAD: She was overseeing.

THE COURT: And she was doing it.

MR. ASSAD: You can't do three 40-hour jobs in one 40-hour period. All I'm saying is, the city councilors



that you have not heard from, Judge, why could they not believe, your Honor, that those individual jobs had to be filled because they have always been filled in the past and there was an intent to fill them in the future?

THE COURT: Can I stay off the record for a second.

(Discussion off the record.)

(Whereupon the hearing was concluded.)

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SUPREME COURT OF THE UNITED STATES

No. 96-1569

Daniel Bogan and Marilyn Roderick,

Petitioners

v.

Janet Scott-Harris

ORDER ALLOWING CERTIORARI. Filed June 9, 1997.

The petition herein for a writ of certiorari to the United States Court of Appeals for the First Circuit is granted. In addition to the questions presented by the petition, the parties are directed to brief and argue the following question: Are individual members of a local legislative body entitled to absolute immunity from liability under 42 U. S. C. 1983 for actions taken in a legislative capacity?

June 9, 1997

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No. 96-1569

Supreme Court, U. S.

FILED

AUG 14 1997

In The  
**Supreme Court of the United States**

October Term, 1996

DANIEL BOGAN AND MARILYN RODERICK,  
*Petitioners,*  
vs.

JANET SCOTT-HARRIS,  
*Respondent.*

On Writ Of Certiorari  
To The United States Court Of Appeals  
For The First Circuit

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## QUESTIONS PRESENTED FOR REVIEW

Are individual members of a local legislative body entitled to absolute immunity from liability under 42 U.S.C. § 1983 for actions taken in a legislative capacity?

Whether the First Circuit Court of Appeals erred in affirming the denial of the Individual Defendants' Motions for Judgment Notwithstanding the Verdict on the grounds that, in conflict with this Court and the majority of other circuit courts, it determined that absolute legislative immunity was unavailable to municipal officials as a defense to an action pursuant to 42 U.S.C. § 1983, because of their improper motives and even though the municipal officials' challenged actions are quintessentially legislative, *i.e.*, the enactment of a local government budget?

Whether the First Circuit Court of Appeals erred in holding that the individual municipal officials proximately caused the plaintiff injury pursuant to 42 U.S.C. § 1983, even though the official municipal decisionmaker lawfully enacted a valid municipal budgetary ordinance?

### LISTING OF ALL THE PARTIES

Undersigned counsel for Petitioners, Daniel E. Bogan and Marilyn Roderick, provide the following list of parties as required by Supreme Court Rule 24(b):

1. Petitioner Daniel E. Bogan was a defendant in the proceedings in the United States District Court for the District of Massachusetts and an appellant before the United States Court of Appeals for the First Circuit.
2. Petitioner Marilyn Roderick was a defendant in the proceedings in the United States District Court for the District of Massachusetts and an appellant before the United States Court of Appeals for the First Circuit.
3. The City of Fall River, Massachusetts, a municipal corporation duly incorporated under the laws of the Commonwealth of Massachusetts, was a defendant in the proceedings in the United States District Court for the District of Massachusetts and an appellant before the United States Court of Appeals for the First Circuit. The City is not a petitioner.
4. Respondent Janet Scott-Harris was the plaintiff in the proceedings in the United States District Court for the District of Massachusetts and the appellee before the United States Court of Appeals for the First Circuit.
5. A number of other defendants in the proceedings in the United States District Court for the District of Massachusetts, were dismissed or granted a directed verdict at various points prior to the appeal.

### LISTING OF ALL THE PARTIES - Continued

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- b. Bruce Assad; Fall River, Massachusetts
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## TABLE OF CONTENTS

	Page
Questions Presented.....	i
Listing of All Parties .....	ii
Table of Contents .....	iv
Table of Authorities .....	vi
Opinions Below .....	1
Statement of Jurisdiction .....	1
Constitutional Treaty or Statutory Provisions.....	1
Statement of the Case .....	3
I. The Government of the City of Fall River ...	3
II. The Department of Health and Human Services ..	4
III. The 1992 Budget.....	6
IV. The District Court Decision .....	7
V. The First Circuit Decision.....	9
Summary of Argument .....	11
Argument .....	14
I. Local Officials Are Entitled To Absolute Immunity For Actions Taken In Their Legislative Capacities.....	14
A. Absolute Legislative Immunity Is Well-Established.....	14
B. All Post-Lake Country Estates Caselaw Has Held Municipal Legislators Absolutely Immune From Suit For Actions Taken In Their Legislative Capacity.....	20

## TABLE OF CONTENTS - Continued

	Page
C. The Same Principles Which Undergird Absolute Legislative Immunity At Other Levels Of Government Apply At The Municipal Level .....	23
II. Local Legislative Officials Are Entitled To Absolute Immunity When They Propose And Enact A Local Ordinance Related To The Local Governmental Budget Regardless Of Their Motivations .....	30
A. The First Circuit Erroneously Considered The Individual Defendants' Motives .....	30
B. According To The Proper Standard Regarding Legislative Immunity, Both Bogan And Roderick Are Absolutely Immune For Their Actions Taken In The Process Of Enacting The Budgetary Ordinance.....	36
III. Individual Municipal Officials Cannot Be The Proximate Cause of Actionable Injury Where The Official Municipal Decisionmaker Lawfully Enacted A Valid Municipal Budgetary Ordinance .....	45
A. The First Circuit's Approach Is Contrary To The Law Of Proximate Causation .....	45
B. The First Circuit's Approach To Proximate Causation Compensates Those Who Have Suffered No Actionable Injury .....	48
C. The First Circuit's Approach To Proximate Causation Would Hinder The Enactment Of Lawful And Proper Legislation.....	50
Conclusion.....	51
Appendix A .....	App. 1

## TABLE OF AUTHORITIES

Page

## CASES

<i>Acevedo-Cordero v. Cordero-Santiago</i> , 958 F.2d 20 (1st Cir. 1992) .....	21
<i>Acierno v. Cloutier</i> , 40 F.3d 597 (3d Cir. 1994).....	13, 40
<i>Aitchison v. Raffiani</i> , 708 F.2d 96 (3d Cir. 1983) .....	17, 21, 32 n.12, 38, 40, 42, 43
<i>Alexander v. Holden</i> , 66 F.3d 62 (4th Cir. 1995) ....	37, 38
<i>Arnold v. International Business Machines, Corp.</i> , 637 F.2d 1350 (9th Cir. 1981).....	46
<i>Barr v. Mateo</i> , 360 U.S. 564 (1959).....	26
<i>Berkley v. Common Council of City of Charleston</i> , 63 F.3d 295 (4th Cir. 1995), <i>cert. denied</i> , 116 S. Ct. 775 (1996).....	39
<i>Brown v. Collins</i> , 937 F.2d 175 (5th Cir. 1991) ...	32 n.12
<i>Bruce v. Riddle</i> , 631 F.2d 272 (4th Cir. 1980) ....	21, 32 n.12
<i>Buckley v. Fitzsimmons</i> , 509 U.S. 259 (1993) ...	19, 25, 42
<i>Buckley v. Valeo</i> , 424 U.S. 1 (1976).....	43
<i>Burns v. Reed</i> , 500 U.S. 478 (1991).....	19, 29
<i>Butz v. Economu</i> , 438 U.S. 478 (1978) ..	19, 20, 25, 26, 33
<i>Calhoun v. St. Bernard Parish</i> , 937 F.2d 172 (5th Cir. 1991), <i>cert. denied</i> , 502 U.S. 1060 (1992).....	41, 42
<i>Carver v. Foerster</i> , 102 F.3d 96 (3d Cir. 1996) .....	38
<i>Chappell v. Robbins</i> , 73 F.3d 918 (9th Cir. 1996) .....	44

## TABLE OF AUTHORITIES – Continued

Page

<i>Cinevision Corp. v. Burbank</i> , 745 F.2d 560 (9th Cir. 1984), <i>cert. denied</i> , 471 U.S. 1054 (1985).....	40
<i>Clinton v. Jones</i> , 117 S. Ct. 1636 (1997) .....	16
<i>Coffin v. Coffin</i> , 4 Mass. 1, 3 Am. Dec. 189 (1808) .....	14, 15, 16, 42, 44
<i>County Comm'rs of Anne Arundel v. Duckett</i> , 20 Md. 468 (1863).....	24
<i>Del Duca v. Town Administrator of Methuen</i> , 368 Mass. 1, 329 N.E.2d 748 (1975).....	4 n.1
<i>Ditch v. Board of County Comm'rs</i> , 650 F. Supp. 1245 (D. Kan. 1986), <i>amended on other grounds</i> , 669 F. Supp. 1553 (D. Kan. 1987).....	39, 40
<i>Dombrowski v. Eastland</i> , 387 U.S. 82 (1967).....	33
<i>Douglas v. City of Jeanette</i> , 319 U.S. 157 (1942) ...	13, 49
<i>Drayton v. Mayor &amp; Council of Rockville</i> , 699 F. Supp. 1155 (D. Md. 1988), <i>aff'd</i> , 885 F.2d 864 (4th Cir. 1989) .....	32 n.12, 38 n.14, 39
<i>Dusanenko v. Maloney</i> , 560 F. Supp. 822 (S.D.N.Y. 1983), <i>aff'd</i> , 726 F.2d 82 (2d Cir. 1984) .....	18, 27, 28, 39, 40
<i>Eastland v. United States Servicemens' Fund</i> , 421 U.S. 491 (1975).....	31, 33, 38 n.14
<i>Edwards v. United States</i> , 286 U.S. 482 (1932) .....	43
<i>Espanola Way Corp. v. Meyerson</i> , 690 F.2d 827 (11th Cir. 1982), <i>cert. denied</i> , 460 U.S. 1039 (1983).....	21
<i>Fletcher v. Peck</i> , 6 Cranch 87, 10 U.S. 87 (1810).....	12, 31, 32 n.12



## TABLE OF AUTHORITIES – Continued

	Page
<i>Forrester v. White</i> , 484 U.S. 219 (1988).....	<i>passim</i>
<i>Fry v. Board of County Comm'rs</i> , 7 F.3d 936 (10th Cir. 1993) .....	21, 32 n.12
<i>Furtado v. Bishop</i> , 604 F.2d 80 (1st Cir. 1979), <i>cert. denied</i> , 444 U.S. 1035 (1980) .....	46
<i>Goldberg v. Rocky Hill</i> , 973 F.2d 70 (2d Cir. 1992) ....	21
<i>Goldberg v. Spring Valley</i> , 538 F. Supp. 646 (S.D.N.Y. 1982).....	39
<i>Gorman Towers, Inc. v. Bogoslavsky</i> , 626 F.2d 607 (8th Cir. 1980) .....	21, 27, 28
<i>Gravel v. United States</i> , 408 U.S. 606 (1972) .....	26, 42
<i>Gregoire v. Biddle</i> , 177 F.2d 579 (2d Cir. 1949), <i>cert. denied</i> , 339 U.S. 949 (1950) .....	29
<i>Gross v. Winter</i> , 876 F.2d 165 (D.C. Cir. 1989) .....	21, 38
<i>Harlow v. Fitzgerald</i> , 457 U.S. 800 (1982) .....	12, 17, 27, 34, 35
<i>Haskell v. Washington Township</i> , 864 F.2d 1266 (6th Cir. 1988), <i>appeal after remand</i> , 891 F.2d 132 (6th Cir. 1989) .....	21
<i>Healey v. Pembroke</i> , 831 F.2d 989 (11th Cir. 1987) ....	39
<i>Herbst v. Daukas</i> , 701 F. Supp. 964 (D. Conn. 1988) ....	39
<i>Hernandez v. Laffayette</i> , 643 F.2d 1188 (5th Cir. 1981), <i>cert. denied</i> , 455 U.S. 907 (1982), <i>appeal after remand</i> , 699 F.2d 734 (5th Cir. 1983)...	21, 43, 44
<i>Hill v. Board of Alderman</i> , 72 N.C. 63 (1875) .....	24
<i>Hunter v. Bryant</i> , 502 U.S. 224 (1991) .....	34
<i>Imbler v. Pachtman</i> , 424 U.S. 409 (1976)...	11, 18, 29, 33

## TABLE OF AUTHORITIES – Continued

	Page
<i>Jones v. Loving</i> , 55 Miss. 109, 30 Am. Rep. 508 (1877) .....	12, 23, 24, 24 n.10
<i>Kilbourn v. Thompson</i> , 103 U.S. 168 (1880) ....	18, 42, 43, 44
<i>Kuzinich v. County of Santa Clara</i> , 689 F.2d 1345 (9th Cir. 1982) .....	21
<i>Lake Country Estates v. Tahoe Regional Planning Agency</i> , 440 U.S. 391 (1979).....	<i>passim</i>
<i>Larsen v. Early</i> , 842 F. Supp. 1310 (D. Colo.), <i>aff'd</i> , 34 F.3d 1076 (10th Cir. 1994).....	42
<i>Leatherman v. Tarrant County Narcotics and Intelligence Coordination Unit</i> , 507 U.S. 163 (1993).....	28
<i>Ligon v. Maryland</i> , 448 F. Supp. 935 (D. Md. 1977) ....	27
<i>McGrain v. Daugherty</i> , 273 U.S. 135 (1927).....	42
<i>Mitchell v. Forsyth</i> , 472 U.S. 511 (1985) .....	33, 34
<i>Monell v. New York City Dep't of Social Services</i> , 436 U.S. 658 (1978) .....	17, 29
<i>New Hampshire v. Rollins</i> , 129 N.H. 684, 533 A.2d 331 (1987).....	17
<i>Nixon v. Fitzgerald</i> , 457 U.S. 731 (1982).....	33
<i>O'Shea v. Littleton</i> , 414 U.S. 488 (1974) .....	18
<i>Orange v. County of Suffolk</i> , 830 F. Supp. 701 (E.D.N.Y. 1993) .....	39, 44
<i>Owen v. City of Independence</i> , 445 U.S. 622 (1980) .....	12, 22, 29
<i>Pierson v. Ray</i> , 386 U.S. 547 (1967) .....	29

## TABLE OF AUTHORITIES – Continued

	Page
<i>Powell v. McCormack</i> , 395 U.S. 486 (1969).....	16, 18, 44
<i>Prentis v. Atlantic Coastline Co.</i> , 211 U.S. 210 (1908) ..	13, 36
<i>Quern v. Jordan</i> , 440 U.S. 332 (1979).....	17 n.8
<i>Rabkin v. Dean</i> , 856 F. Supp. 543 (N.D. Cal. 1994) .....	39, 40
<i>Racine v. Cecil County</i> , 843 F. Supp. 53 (D. Md. 1994).....	39
<i>Rateree v. Rockett</i> , 852 F.2d 946 (7th Cir. 1988).....	18, 28, 32 n.12, 37, 38, 40
<i>Rateree v. Rockett</i> , 630 F. Supp. 763 (N.D. Ill. 1986), aff'd, 852 F.2d 946 (7th Cir. 1988) .....	13, 36, 41
<i>Reed v. Shorewood</i> , 704 F.2d 943 (7th Cir. 1983) .....	21
<i>Roberson v. Mullins</i> , 29 F.3d 133 (4th Cir. 1994) .....	38
<i>Ryan v. Burlington County, NJ</i> , 889 F.2d 1286 (3d Cir. 1989).....	26
<i>Siegert v. Gilley</i> , 500 U.S. 226 (1991).....	34
<i>Smiley v. Holm</i> , 285 U.S. 355 (1932).....	43
<i>Smith v. Lomax</i> , 45 F.3d 402 (11th Cir. 1995).....	44
<i>Spallone v. United States</i> , 493 U.S. 265 (1990).....	12, 14, 16, 22, 23, 27, 29
<i>Springer v. Seamen</i> , 821 F.2d 871 (1st Cir. 1987) .....	46
<i>Supreme Ct. of Va. v. Consumers Union, Inc.</i> , 446 U.S. 719 (1980).....	passim
<i>Tenney v. Brandhove</i> , 341 U.S. 367 (1951).....	passim
<i>United States v. Brewster</i> , 408 U.S. 501 (1972) .....	31, 42
<i>United States v. Gillock</i> , 445 U.S. 360 (1980).....	18

## TABLE OF AUTHORITIES – Continued

	Page
<i>Wagenmann v. Adams</i> , 829 F.2d 196 (1st Cir. 1987) .....	45, 47, 48
<i>Will v. Michigan Dep't of State Police</i> , 491 U.S. 58 (1989).....	17 n.8
<i>Wilson v. New York</i> , 1 Denio 595 (N.Y. 1845) .....	24
<i>Yeldell v. Cooper Green Hosp., Inc. et al.</i> , 956 F.2d 1056 (11th Cir. 1992).....	43
 STATUTES AND RULES	
18 U.S.C. § 242.....	18, 29
28 U.S.C. § 1254(1) .....	1
28 U.S.C. § 1331.....	8
28 U.S.C. § 1343(3) .....	8
42 U.S.C. § 1983.....	passim
Mass. Gen. L. Ann. ch. 43, § 2 .....	3
Mass. Gen. L. Ann. ch. 43, § 46 .....	3
Mass. Gen. L. Ann. ch. 43, § 48 .....	4
Mass. Gen. L. Ann. ch. 43, § 50 .....	4
Mass. Gen. L. Ann. ch. 43, § 55 .....	2, 4, 30
Mass. Gen. L. Ann. ch. 43B, § 3 .....	4
Mass. Gen. L. Ann. ch. 44, § 32 .....	4, 7 n.3, 26, 30
Mass. Gen. L. Ann. ch. 44, § 33 .....	3, 4



## TABLE OF AUTHORITIES – Continued

	Page
Conn. Gen. Stat. § 7-148.....	26
N.H. Rev. Stat. Ann. § 40-A-1.....	26
N.J. Rev. Stat. § 40:42:1 <i>et seq.</i> .....	26
Sup. Ct. R. 24(b).....	ii
UNITED STATES CONSTITUTION	
Speech or Debate Clause, Art. I, § 6.....	1
First Amendment .....	2, 8, 32
STATE CONSTITUTIONS	
Alaska Const., art. II § 6 .....	15 n.7
Ariz. Const. art. XIII § 2 .....	26
Ariz. Const. art. XIII § 3 .....	26
Cal. Const. art. XI § 6 <i>et seq.</i> .....	26
Ga. Const., art. IX § 2, ¶ 2 .....	26
Hawaii Const., art. III § 7 .....	15 n.7
Kan. Const. art. 12, § 5.....	26
La. Const., art. VI, § 5.....	26
Mass. Const. amend. art. II, § 1 .....	4, 26
Mass. Const. amend. art. II, § 6 .....	4, 26
Mass. Const. amend. art. II, § 7 .....	4, 26

## TABLE OF AUTHORITIES – Continued

	Page
TREATISES, LAW REVIEW ARTICLES AND OTHER SOURCES	
J. Bishop, <i>Commentaries on the Non-Contract Law</i> , § 744 (1889).....	25
Congressional Globe, 42d Congress, 1st Session (1871).....	12, 25
T. Cooley, <i>A Treatise on the Law of Torts or the Wrongs Which Arise Independent of Contract</i> , 376 (1880).....	25
J. Dillon, <i>Law of Municipal Corporations</i> , § 313 (3d ed. 1881) .....	12, 25
F. Mechem, <i>A Treatise on the Law of Public Offices and Officers</i> , § 646 (1890).....	25
II Works of James Wilson (Andrews ed. 1896).....	15

## OPINIONS AND ORDERS BELOW

The opinion of the United States District Court for the District of Massachusetts, Hon. Patricia Saris, presiding is unreported, but a copy of the order denying the Defendants' Motions for Judgment Notwithstanding the Verdict is printed in the Appendix to the Petition for Certiorari (hereinafter "*Petition Appendix*" or "*Pet. App.*") at *Pet. App.* 1-33. The opinion of the Court of Appeals for the First Circuit is not yet reported, but a copy of the slip opinion is reproduced in the *Petition Appendix* at *Pet. App.* 36-74. The judgment of the district court and the First Circuit denial of rehearing are also reproduced in the *Petition Appendix* at *Pet. App.* 75 and 76-78, respectively.

## JURISDICTION

The opinion of the Court of Appeals for the First Circuit issued on January 15, 1997, *Pet. App.* at 36. A timely petition for rehearing was denied February 24, 1997. *Id.* at 76. The First Circuit entered judgment on January 15, 1997, and its mandate was stayed on March 7, 1997. *Id.* at 34. This Court granted the Petitioners' Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit on June 9, 1997. *Joint Appendix* (hereinafter "*J.A.*") at 287. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL, TREATY OR STATUTORY PROVISIONS

Article I, Section 6 of the United States Constitution provides:

The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony, and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in



either House, they shall not be questioned in any other Place.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

The First Amendment to the United States Constitution provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.

Section 1983 of Title 42, Chapter 21 of the United States Code provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Section 55 of Chapter 43, of the Massachusetts General Laws provides:

Every order, ordinance, resolution and vote relative to the affairs of the city, adopted or passed by the city council, shall be presented to the mayor for his approval. If he approves it he shall sign it; if he

disapproves it he shall return it, with his written objections, to the city council, which shall enter the objections at large on its records, and again consider it. If the city council, notwithstanding such disapproval of the mayor, shall again pass such order, ordinance, resolution or vote by a two thirds vote of all its members, it shall then be in force, but such vote shall not be taken for seven days after its return to the city council. Every such order, ordinance, resolution and vote shall be in force if not returned by the mayor within ten days after it has been presented to him. This section shall not apply to budgets submitted under section thirty-two of chapter forty-four or to appropriations by a city council under section thirty-three of said chapter.

Section 33 of Chapter 44, of the Massachusetts General Laws provides:

In case of the failure of the mayor to transmit to the city council a written recommendation for an appropriation for any purpose not included in the annual budget, which is deemed necessary by the council, after having been so requested by vote thereof, said council, after the expiration of seven days from such vote, upon its own initiative may make such appropriation by a vote of at least two thirds of its members, and shall in all cases clearly specify the amount to be expended for each particular purpose, but no appropriation may be voted hereunder so as to fix specific salaries of employees under the direction of boards elected by the people, other than the city council.

## STATEMENT OF THE CASE

### I. THE GOVERNMENT OF THE CITY OF FALL RIVER.

Upon its incorporation, the City of Fall River (hereinafter "the City") adopted as its city charter, Plan A, pursuant to Massachusetts General Laws Chapter 43, §§ 2, 46 (1994). *See J.A.* at 82. Pursuant to the Massachusetts Constitution, the

City has the power to revise and amend its charter. *See* Mass. Const. amend. art. II, § 1, 6-7; *see also* Mass. Gen. L. Ann. ch. 43B, § 3 (1994).<sup>1</sup> In addition, as a Plan A form of government, the City is governed by a mayor and city council, which consists of nine councillors elected at large by and from the qualified voters of the City. *See* Mass. Gen. L. Ann. ch. 43, §§ 48, 50 (1994). Municipal ordinances legislating in a variety of areas may be passed upon proposal by the mayor and a favorable vote of the majority of the city councillors. *See id.* at § 55; *see also* J.A. at 35-87.

By state statute the City must enact an annual budget. *See* Mass. Gen. L. Ann. ch. 44, § 32 (1994) (reproduced in Appendix A). The mayor must submit to the city council an annual budget which contains his or her recommended expenditures, by specified classifications and designations, for the city for the upcoming fiscal year. *Id.* "The city council may by majority vote make appropriations for the purposes recommended and may reduce or reject any amount recommended in the annual budget." *Id.* at § 32(2). Further, the city council may add appropriations to the mayor's recommended budget which it deems necessary and which it approves by two-thirds of the council members. *See id.* at § 33. If the mayor fails to submit his or her recommended budget within the time specified by statute, the city council, on its own initiative, shall prepare the annual budget and vote on the amounts appropriated in that budget. *Id.* at § 32.

## II. THE DEPARTMENT OF HEALTH AND HUMAN SERVICES.

In 1987, the Mayor and majority of the City Council enacted an ordinance establishing the Department of Health and Human Services ("DHHS") for the City. *See* J.A. at 100.

<sup>1</sup> The Home Rule Amendment and the Home Rule Procedures Act permit municipalities to exercise any power or function conferrable by the legislature so long as the exercise is not inconsistent with the Constitution and General Laws. *See Del Duca v. Town Administrator of Methuen*, 368 Mass. 1, 10, 329 N.E.2d 748, 754 (1975).

DHHS was established to oversee four pre-existing City divisions: the Public Health Department, the Council on Aging, the Department of Veterans Affairs, and the Buildings and Code Enforcement Department. *Id.* These divisions, through their division heads, reported to the Administrator of DHHS, who in turn reported to the City Administrator. Pursuant the City's Charter, DHHS could be dismantled only by enactment of an ordinance. *See id.* at 88.

After the creation of DHHS by ordinance, Janet Scott-Harris, an African-American woman, was selected as the Administrator of DHHS in 1987, at an annual salary of \$48,600. *See Pet. App.* at 2. The position did not have civil service or contract protection. *Id.* During the course of her employment as Administrator of DHHS, Scott-Harris performed well, but experienced ongoing conflict with and hostility from another City employee, Ms. Dorothy Biltcliffe. *See id.* at 2, 4-6. Biltcliffe was employed at the Council on Aging and Scott-Harris had heard Biltcliffe use racially charged and inappropriate language. *Id.* at 4-5. After consulting with Mr. Robert L. Connors, the City Administrator, Scott-Harris filed a complaint against Biltcliffe based on this conduct. *Id.* Biltcliffe threatened to use her "influence" in response to the charges. *Id.* She contacted several people, including Ms. Marilyn Roderick, a City Councillor and Chairperson of the City's Ordinance Committee. *Id.*

A hearing on the charges was scheduled. On the day of the hearing, a settlement was accepted by the attorney present on behalf of Scott-Harris, whereby Biltcliffe was suspended without pay for sixty days. Biltcliffe's suspension was later reduced by Mr. Daniel E. Bogan after he became acting Mayor of the City.<sup>2</sup>

<sup>2</sup> Due to an inadvertent error by the City, Biltcliffe's position, a civil service position to which Biltcliffe had a right to by law, was filled by another employee while Biltcliffe was on leave of absence. In the 1992 Budget, the City attempted to correct this error by funding another administrative position for the other employee. Upon her return from leave, Biltcliffe was returned to her previous position to which she was entitled.



### III. THE 1992 BUDGET.

In December 1990, the Mayor of Fall River resigned to accept another position. *Pet. App.* at 6. Bogan, as President of the City Council, became acting Mayor of the City on December 21, 1990. *Id.* In January 1991, in preparation for the 1992 Fiscal Year Budget, Mayor Bogan and Connors requested the various City Departments to submit budget proposals which included a 10% decrease in expenses from the previous fiscal year due to the anticipated decline in state aid to the City for 1992. *Id.* at 6-7. Scott-Harris submitted a budget for DHHS with a proposal to reduce that Department's budget through the elimination of vacant positions and reducing nursing services in schools and senior centers. *Id.* at 7.

After receiving the budget proposals, Connors presented Mayor Bogan with options for reducing the 1992 budget: (1) reduce expenses; (2) reduce capital outlays; and/or (3) reduce personnel. *See Tr. Trans.* at 5:44. Additionally, Connors provided Mayor Bogan with a list of vacant positions. *See id.*; *Pet. App.* at 7. In response, Mayor Bogan requested a list of all temporary positions, provisional positions, positions not under contract, positions not protected by Civil Service, and positions which had no impact on "front line" service. *See Tr. Trans.* at 5:45. Connors provided Mayor Bogan with the list, which included Scott-Harris' position as Administrator of DHHS. *Id.*

In conjunction with other cost saving measures, Mayor Bogan proposed the elimination of DHHS to reduce expenses for fiscal year 1992. *Pet. App.* at 7. Because the City created DHHS by ordinance, it could only be eliminated by ordinance. *J.A.* at 88. Mayor Bogan presented his proposed budget cuts to the City Council, including an ordinance eliminating DHHS (hereinafter "the Ordinance"). The Ordinance Committee of the City Council, chaired by Councillor Roderick, reported out the Ordinance and recommended its passage. *Pet.*

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under applicable civil service laws. *See* Testimony of Robert L. Connors, Trial Transcript (hereinafter "Tr. Trans.") at 5:29-30.

*App.* at 7-8. Shortly thereafter, a majority of the City Council approved the Ordinance in a six-to-two vote, with Councillor Roderick voting with the majority. *Id.*

The only reason stated during the City Council discussion of the Ordinance was the projected shortage of money – no one discussed the Biltcliffe affair or dissatisfaction with Scott-Harris' performance. *See id.* at 8. Mayor Bogan then signed the Ordinance into law, eliminating DHHS and therefore eliminating Scott-Harris' position. *Id.* The Ordinance became effective March 29, 1991.<sup>3</sup> Prior to the passage of the Ordinance, Mayor Bogan and Connors offered Scott-Harris another City position, which she rejected shortly before the Ordinance was passed. *Id.* at 9-10.

A total of 135 City positions were unfunded or eliminated in the 1992 Budget resulting in the actual termination of twenty-seven City employees. *Id.* at 8; *see also* Trial Exhibits 40 and 40A. In addition, Mayor Bogan froze all City employee salaries for 1992. While the Administrator of DHHS was the only administrator whose position was eliminated on the City employee roster (by virtue of the elimination of DHHS), at least five administrative positions were eliminated in the City's school budget. *See* Trial Exhibit 44.

### IV. THE DISTRICT COURT DECISION.

Scott-Harris filed suit in the United States District Court for the District of Massachusetts, against the City of Fall River, Mayor Bogan, Councillor Roderick, and other City Councillors and officials, in their individual and official capacities, alleging in relevant part that, by passage of the Ordinance, they had (1) discriminated against her in violation of 42 U.S.C. § 1983 based upon her race; and (2) discriminated against her in violation of 42 U.S.C. § 1983 based upon

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<sup>3</sup> Had the Ordinance not been enacted prior to the submission of the annual budget to the city council, Mayor Bogan, by state statute, would have been required to recommend the appropriation of funds for DHHS for fiscal year 1992. *See* Mass. Gen. L. ch 44, § 32.

speech protected by the First Amendment.<sup>4</sup> See *J.A.* at 47-56. The district court asserted federal subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343(3). The district court denied Bogan's and Roderick's motions to dismiss as to each of them on the grounds of absolute legislative immunity as untimely, reserving the issue until after trial. *Id.* at 71-72, 73-74.

The district court commenced a nine day jury trial on May 16, 1994. *Id.* at 18. After the completion of the Defendants' case, the district court and the parties conducted an extensive jury charge conference.<sup>5</sup> The result of that conference was a special verdict form which was explained to the jury in detail by the district court. *Id.* at 137-140; 190-226. The form required the jury to address the liability of the three Defendants in a particular order: first the liability of the City (defined as the Mayor and the majority of the City Council), then the personal liability of Mayor Bogan and Councillor Roderick (hereinafter "the Individual Defendants"). The form required, and the district court clearly instructed, that if the jurors were to find that the City was not liable, then they were to proceed no further with their deliberations. See *id.*<sup>6</sup> None

<sup>4</sup> The other Defendants included Connors and four councillors. *J.A.* at 49-50. The claims against the four councillors were dismissed by joint stipulation and the district court granted Connors' motion for a directed verdict. *Id.* at 66-70; 133-137.

<sup>5</sup> The jury charge conference was not transcribed or recorded, and therefore there is no transcript of the conference in the record.

<sup>6</sup> The special verdict form was effectively comprised of four sections: Questions 1 through 4 dealt with the City's liability; Questions 5 through 7, and Questions 8 through 10 dealt with Mayor Bogan's and Councillor Roderick's individual liability, respectively; and Questions 11 through 15 then dealt with damages. *J.A.* at 137-141. The form advised jurors that, unless they found that the City had terminated Scott-Harris because of her race (Question 2) or because she had engaged in constitutionally protected speech (Question 3), and found that the City had thereby proximately caused Scott-Harris injury (Question 4), they were not to address any question pertaining to either Individual Defendant. See *id.*

of the parties objected to the instructions on the record prior to the jury charge. See *id.*

In response to the special questions, the jury found that there was no racial discrimination, but that Scott-Harris had proven that her protected speech was a substantial or motivating factor in the City's decision to enact the Ordinance. *Id.* at 149-153. The jury, as required by the instructions and verdict form, then went on to find that the Individual Defendants proximately caused the elimination of Scott-Harris' position, and acted maliciously or with reckless indifference to her rights. *Id.*

Following the entry of the verdict, the City, Bogan and Roderick filed Motions for Judgment Notwithstanding the Verdict, which the district court denied. *Id.* at 157-162; *Pet. App.* at 1-33. Specifically, the district court rejected the Individual Defendants' argument that they were entitled to a verdict in their favor on the grounds of absolute legislative immunity. *Pet. App.* 17-20. Noting that the First Circuit warranted submitting the question of whether the challenged actions were legislative or administrative to the jury, the district court concluded that the Individual Defendants were not entitled to immunity because the jury had found that the proffered reason for the Ordinance was pretextual, and that a substantial or motivating factor in its enactment was Scott-Harris' protected speech. *Id.* 19-20. Further, the district court noted that the "facially neutral" ordinance had a particularized impact on Scott-Harris as the only employee in the DHHS Department whose position was eliminated by the Ordinance. *Id.* at 20. The combination of these findings by the jury implied that the Ordinance "passed by the city council was an individually-targeted administrative act, rather than a neutral elimination of a position which incidentally resulted in the termination of the plaintiff." *Id.*

## V. THE FIRST CIRCUIT OPINION.

On January 15, 1997, the United States Court of Appeals for the First Circuit reversed the district court's denial of the City of Fall River's Motion for Judgment Notwithstanding the



Verdict, holding that "no reasonable jury could find against the City on the proof presented." *Pet. App.* at 63; *see also id.* at 34-35. With respect to the Individual Defendants, the court of appeals affirmed the denials of their Motions for Judgment Notwithstanding the Verdict on grounds of legislative immunity, causation and sufficiency of the evidence. *Id.* at 66, 69, 70-71; *see also id.* at 34-35.

The First Circuit, after resolving issues related to the notice of appeal and the jury verdict form, addressed the liability of the municipality for passing a facially benign ordinance for allegedly unconstitutional reasons in violation of Scott-Harris' First Amendment rights. *Id.* at 53-63. Noting the competing views on the quantum of proof necessary for a plaintiff to prevail under such circumstances, the court assumed that "in a sufficiently compelling case the requirement that the plaintiff prove bad motive on the part of a majority of the members of the legislative body might be relaxed . . . [but] any such relaxation would be contingent on the plaintiff mustering evidence of both (a) bad motive on the part of at least a significant bloc of legislators, and (b) circumstances suggesting the probable complicity of others." *Id.* at 59. The court found it unnecessary to explicate further on the level of proof necessary, holding that "Scott-Harris has not only failed to prove that a majority of the councillors possessed a bad motive, but she also has failed to furnish enough circumstantial evidence to ground a finding of that, more likely than not, a discriminatory animus propelled the City Council's action." *Id.* at 59-60. The court further noted that Scott-Harris produced no evidence as to seven out of the eight councillors who cast votes on the Ordinance and there was nothing to suggest that the City had deviated from the normal protocol for receiving and enacting ordinances. *Id.* at 60-61.

The First Circuit then turned to the individual liability of Bogan and Roderick. *Id.* at 63-71. Although the unchallenged jury instructions indicated that if there were no liability against the City there could be no liability against either Bogan or Roderick, the court went on to address the individual municipal officials' liability and affirmed the district

court's denial of their Motions for Judgment Notwithstanding the Verdict. *Id.* The court reasoned that the district court properly left the determination of absolute immunity to the jury and that, based on the jury's findings regarding the motivating factors for the enactment of the Ordinance, the denial of absolute immunity was proper. *Id.* at 65-66. Further, the court held that there was sufficient evidence that the individuals were the proximate cause of the enactment of the lawful Ordinance which resulted in the elimination of DHHS. *Id.* at 67-69. Finally, the court held that there was sufficient evidence to find that Scott-Harris' protected speech was a substantial or motivating factor behind the individuals' actions. *Id.* at 70-71.

## SUMMARY OF ARGUMENT

I. Absolute immunity for legislators at all levels of government performing legislative functions is well-grounded in history and in reason. *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 403 (1979); *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951). The need to protect the democratic decisionmaking process, the danger of time and energy distraction, as well as the deterrence of qualified individuals from public service, are all reasons which militate in favor of immunity for legislators. *See, e.g., Supreme Ct. of Va. v. Consumers Union, Inc.*, 446 U.S. 719, 731-732 (1980); *Tenney*, 341 U.S. at 373, 377. In addition, liability of the government entity, criminal liability for willful deprivations of constitutional rights, and the electoral process, all provide essential checks (or remedies) against unlawful government conduct. *See Lake Country Estates*, 440 U.S. at 405 n.29; *Imbler v. Pachtman*, 424 U.S. 409, 429 (1976); *Tenney*, 341 U.S. at 378.

Without exception, all post-*Lake Country Estates* cases that have considered this issue have held that municipal legislators are entitled to the same absolute immunity as their federal, state and regional counterparts. Moreover, this Court has clearly indicated its approval of this approach, despite having never directly addressed this precise question. *See*

*Lake Country Estates*, 440 U.S. at 404 n.26; *id.* at 407 (Marshall, J., dissenting); *Owen v. City of Independence*, 445 U.S. 622, 625-630 (1980); *Spallone v. United States*, 493 U.S. 265, 267 (1990).

As recognized by the post-*Lake Country Estates* decisions, the policies and reasoning which undergird absolute immunity for federal, state and regional legislators apply equally at the local level. There is nothing, either at common law or in the legislative history of 42 U.S.C. § 1983, to suggest that municipal legislators were viewed as *sui generis* and, therefore, not entitled to absolute legislative immunity. See, e.g., *Jones v. Loving*, 55 Miss. 109, 111, 30 Am. Rep. 508 (1877); Congr. Globe, 42d Congr., 1st session; 1 J. Dillon, *Law of Municipal Corporations*, § 313, p. 326 (3d ed. 1881). Municipal legislators performing the same functions as their federal, state, and regional counterparts, therefore, should be entitled to absolute immunity when performing those functions. See *Supreme Ct. of Va.*, 446 U.S. at 721-722, 733-734; *Tenney*, 341 U.S. at 376; see also *Forrester v. White*, 484 U.S. 219, 224 (1988).

II. *Tenney* and its progeny explicitly disavow the motive-based approach to absolute immunity employed by the First Circuit Court of Appeals. See *Tenney*, 341 U.S. at 377; see also *Fletcher v. Peck*, 6 Cranch 87, 131, 10 U.S. 87 (1810). Contrary to that court's analysis, the focus of the absolute immunity inquiry is the *function* performed by the official, rather than the *motives* underlying their actions. *Forrester*, 484 U.S. at 224. Absolute immunity is intended to protect individuals from the cost, inconvenience, and distraction of a trial. *Supreme Ct. of Va.*, 446 U.S. at 731-732. The First Circuit's infusion of a subjective element into the absolute immunity analysis forces defendants to defend against factual allegations and await their resolution prior to being permitted to avail themselves of absolute immunity's protections. In doing so, the First Circuit's formulation of the absolute immunity standard provides *less* protection to officials than qualified immunity under the post-*Harlow v. Fitzgerald* standard. See *Harlow v. Fitzgerald*, 457 U.S. 800, 814-816 (1981).

Under the proper standard for absolute immunity, both Bogan and Roderick are entitled to absolute immunity because they were performing traditionally legislative functions, *i.e.*, the enactment of a budgetary ordinance, regardless of any allegedly improper motive. See *Lake Country Estates*, 440 U.S. at 406; *Tenney*, 371 U.S. at 377. Budgetmaking, including the elimination of municipal positions, signifies the formulation of prospective, legislative-type policy indicative of traditionally legislative functions. See *Rateree v. Rockett*, 630 F. Supp. 763, 771 (N.D. Ill. 1986), *aff'd*, 852 F.2d 946 (7th Cir. 1988); see also *Prentis v. Atlantic Coastline Co.*, 211 U.S. 210, 226 (1908). This principle is true regardless of the scope of the impact of the legislation at issue because the function performed, *i.e.*, the ordering of priorities in light of limited financial resources, controls the determination whether local officials are performing legislative functions entitling them to absolute immunity. See *Acierno v. Cloutier*, 40 F.3d 597, 613 (3d Cir. 1994); see also *Forrester*, 484 U.S. at 224.

III. Where, as here, a city (or other government entity), enacts facially benign legislation for lawful reasons, the individuals who participate in the enactment of that legislation cannot, as a matter of law, proximately cause any actionable injury to those who may be adversely affected by the legislation. Only where the action challenged by the plaintiff was improper and where the individual officials played a significant role in orchestrating the improper action, may individual legislators be deemed the proximate cause of injury flowing from the enactment of legislation. To permit individual legislators to be held liable without such proof would permit anyone adversely affected by otherwise lawful legislation to target one or two individuals in the process and, merely by assigning some improper motive on the part of these individuals, recover for an "injury" which is the lawful effect of lawful legislation. Cf. *Douglas v. City of Jeanette, et al.*, 319 U.S. 157, 165 (1942).



## ARGUMENT

### I. LOCAL OFFICIALS ARE ENTITLED TO ABSOLUTE IMMUNITY FOR ACTIONS TAKEN IN THEIR LEGISLATIVE CAPACITIES.

#### A. Absolute Legislative Immunity Is Well-Established.

##### 1. Absolute legislative immunity is well-grounded in history and reason.

In *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951), this Court recognized that Congress did not intend § 1983 to abrogate immunities "well grounded in history and reason." "The immunity of legislators from civil suit for what they do or say as legislators has its roots in the parliamentary struggles of 16th- and 17th-century England; such immunity was consistently recognized in the common law and was taken as a matter of course by our Nation's founders." *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 403 (1979); *accord Spallone v. United States*, 493 U.S. 265, 279 (1990); *Supreme Ct. of Va. v. Consumers Union, Inc.*, 446 U.S. 719, 732 (1980); *Tenney*, 341 U.S. at 372-375. "The provision in the United States Constitution was a reflection of political principles already firmly established in the States. Three State Constitutions adopted before the Federal Constitution specifically protected the privilege," including the Massachusetts Constitution of 1780. *Tenney*, 341 U.S. at 373.

In what this Court has described as "perhaps the earliest American case to consider the import of the legislative privilege," *Spallone*, 493 U.S. at 279, the Supreme Judicial Court of Massachusetts, interpreting a provision of the Massachusetts Constitution granting the rights of freedom of speech and debate to state legislators, recognized the central importance of the privilege, as well as its well-settled historical roots. *Coffin v. Coffin*, 4 Mass. 1, 27, 3 Am. Dec. 189 (1808). By the time of *Tenney*, 41 of 48 states had specific provisions in their Constitutions protecting the privilege of legislators to

be free from arrest or civil process for actions taken in their legislative capacity.<sup>7</sup>

A legislator's absolute immunity from suit is equally well-grounded in reason. As stated by Justice Frankfurter writing for the majority in *Tenney*:

The reason for the privilege is clear. It was well summarized by James Wilson, an influential member of the Committee of Detail which was responsible for the provision in the Federal Constitution. "In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offence." II Works of James Wilson (Andrews ed. 1896) 38.

*Tenney*, 341 U.S. at 373.

The same fundamental principle – that the immunity is essential for the public good – had been recognized some 150 years before *Tenney* by the Massachusetts Supreme Judicial Court in *Coffin v. Coffin*. In granting the rights of freedom of speech and debate to state legislatures, the court recognized that

[t]hese privileges are thus secured, not with the intention of protecting the members against prosecutions for their own benefit, but to support the rights of the people by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal. I therefore think that the article ought not to be construed strictly, but liberally, that the full design of it may be answered. I will not confine this to delivering an opinion, uttering a speech, or haranguing in debate; but will extend it to the giving of a vote, to the

<sup>7</sup> Since then, two other states have adopted such provisions. See Alaska Const., art. II § 6; Hawaii Const., art. III § 7.

making of a written report, and to every other act resulting from the nature, and any execution, of the office . . . .

*Coffin*, 4 Mass. at 27 (Parsons, C.J.). The privilege is both an individual privilege and a public right. *Id.*

Citing *Coffin* with approval in *Spallone v. United States*, 492 U.S. 265 (1989), Chief Justice Rehnquist, writing for the majority, noted that this theme "underlies our cases interpreting the Speech or Debate Clause and the federal common law of legislative immunity, where we have emphasized that any restriction on a legislator's freedom undermines the 'public good' by interfering with the rights of the people to representation in the democratic process." *Id.* at 279 (citations omitted). Specifically addressing the appropriateness of a contempt sanction imposed on local legislators, the Court expressed its concern that "[t]he imposition of sanctions on individual legislators is designed to cause them to vote, not with a view to the interests of their constituents or of the city, but with a view solely to their own personal interests." *Id.*; see also, e.g., *Supreme Ct. of Va.*, 446 U.S. at 731-732; *Lake Country Estates*, 440 U.S. at 404-405; *Powell v. McCormack*, 395 U.S. 486, 503 (1968). Cf. *Forrester v. White*, 484 U.S. 219, 223 (1988) (by its nature, threat of liability can create perverse incentives that inhibit officials in the proper performance of their duties).

The need to protect against distortion in the democratic decisionmaking process is, then, a long and widely recognized reason for cloaking legislators with absolute immunity. The problem of "time and energy distraction" is a second, critically important consideration militating in favor of immunity. See *Tenney*, 341 U.S. at 377 (absolute immunity for legislators avoids the danger they will "be subjected to the cost and inconvenience and distractions of a trial"); *Supreme Ct. of Va.*, 446 U.S. at 731-732 ("To preserve legislative independence, we have concluded that legislators engaged in the sphere of legitimate legislative activity, should be protected not only from the consequences of litigation's results but also from the burden of defending themselves." (internal citations and quotations omitted)); see also *Clinton v. Jones*,

117 S. Ct. 1636, 1657 (1997) (Breyer, J., concurring) (discussing the importance of this factor, as well as the risk of "official decision distortion," with respect to the applicability of immunity principles generally and observing that "[t]he cases ultimately turn on an assessment of the threat that a civil damage lawsuit poses to a public official's ability to perform his job properly.").

A third factor may be summarized as deterrence: able individuals will be deterred from serving as legislators if doing so exposes them to potentially staggering personal liability. See *Harlow v. Fitzgerald*, 457 U.S. 800, 827 (1982) (Burger, J., dissenting) (noting the number of frivolous lawsuits filed against public officials and the defending party's liability for costs and damages associated with the defense of these cases, which may discourage able individuals from running for office); see also *New Hampshire v. Rollins*, 129 N.H. 684, 686, 533 A.2d 331, 332 (1987) (Souter, J.) (discussing the principles behind prosecutorial immunity and observing that without such immunity, "it would be unreasonable to expect anyone to assume the risks that would follow from prosecuting for the public benefit.").

It has also been recognized as important that absolute legislative immunity does not eliminate essential checks on (or remedies against) unlawful governmental conduct. Plaintiffs almost invariably have a direct cause of action against the governmental entity within which the individual legislators serve. See *Lake Country Estates*, 440 U.S. at 405 n.29 (citing *Monell v. New York City Dep't of Social Serv.*, 436 U.S. 658, 663 (1978)); *Aitchison v. Raffiani*, 708 F.2d 943, 953 (3d Cir. 1983).<sup>8</sup> Moreover, willful deprivations

<sup>8</sup> While this is true at the municipal and regional level, see *infra*, Part I(C)(3), the extent to which a plaintiff may recover against the governmental entity at the state level is necessarily narrower. See *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 67, 71 (1989) (relying on Eleventh Amendment and concluding that § 1983 suits against state governments cannot be brought in state court); *Quern v. Jordan*, 440 U.S. 332 (1979) (Eleventh Amendment bars § 1983 suits against state governments in federal courts). State officials may, however, be sued in their official capacity for injunctive relief. See *Will*, 491 U.S. at 71 n.10.



of constitutional rights under color of state law remain punishable under 18 U.S.C. § 242, the criminal analog of § 1983. *Imbler*, 424 U.S. at 429; see *United States v. Gillock*, 445 U.S. 360, 372 (1980) (official immunity cases have drawn the line at civil actions) (quoting *O'Shea v. Littleton*, 414 U.S. 488, 502 (1974)). Finally, legislators are generally elected officials "subject to the responsibility and the brake of the electoral process." *Lake Country Estates*, 440 U.S. at 409 (Blackmun, J., dissenting). As observed by the Court in *Tenney*, "[i]n times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed. Courts are not the place for such controversies. Self-discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses." 341 U.S. at 378 (internal citations omitted); see also, e.g., *Rateree v. Rockett*, 852 F.2d 946, 951 (7th Cir. 1988) ("[o]ne recourse in dealing with legislators who hide behind their shield of immunity and vote 'improperly' is, of course, a resort to the ballot box,"); *Dusanenko v. Maloney*, 560 F. Supp. 822, 827 (S.D.N.Y. 1983), *aff'd*, 726 F.2d 82 (2d Cir. 1984).

In short, absolute legislative immunity has deep historical roots. The policy behind legislative immunity is the public good that derives from allowing public officials to perform legislative functions without fear of personal liability. Moreover, absolute legislative immunity promotes this "public good" while maintaining essential checks on, and remedies against, unlawful governmental conduct.

## **2. This Court has recognized absolute immunity for legislators at every level of government for which the question has been considered.**

Consistent with these fundamental principles, this Court has recognized that legislators are entitled to absolute immunity at every level of government for which the question has been presented to the Court for consideration. See *Kilbourn v. Thompson*, 103 U.S. 168, 202-204 (1880) (federal level); *Powell*, 395 U.S. at 502-506 (same); *Tenney*, 341 U.S. at 379 (state level); *Supreme Ct. of Va.*, 446 U.S. at 733-734 (same); *Lake Country Estates*, 440 U.S. at 406 (regional level). In

determining that legislators at all levels of government are entitled to absolute immunity, the Court applies a "functional approach," which looks to "the nature of the function performed, not the identity of the actor who performed it." *Forrester*, 484 U.S. at 222; see also *Buckley v. Fitzsimmons*, 509 U.S. 259, 269 (1993); *Burns v. Reed*, 500 U.S. 478, 486 (1991) (also noting that the official seeking absolute immunity bears the burden of showing immunity is justified for the function in question).

In *Tenney*, the Court first considered whether the passage of § 1983, which by its plain language applied to "every person," had abrogated the privilege accorded to state legislatures at common law. 341 U.S. at 376. *Tenney* held squarely that it did not. *Id.* Examining § 1983 in light of the "presuppositions of our political history" and our heritage of legislative freedom, the Court found it incredible "that Congress . . . would impinge on a tradition so well grounded in history and reason" without some indication of intent more explicit than the general language of the statute. *Id.* at 372, 376.

Applying the functional analysis, in *Lake Country Estates* the Court held that regional legislators are entitled to the same form of absolute immunity. 440 U.S. at 406. Specifically, Justice Stevens, writing for the majority, stated that "to the extent that . . . these individuals were acting in a capacity comparable to that of members of the state legislature, they are entitled to absolute immunity from federal damages liability." *Id.* (emphasis supplied). Given the similarity of function, the Court concluded that the reasoning behind the provision of absolute immunity "is equally applicable to federal, state, and regional legislatures." *Id.* at 405.

As the Court in *Lake Country Estates* noted, its holding was fully consistent with the functional analysis previously applied in *Butz v. Economou*, 438 U.S. 478 (1978), which recognized absolute immunity for individuals performing judicial and prosecutorial functions within the Department of Agriculture. *Id.* at 405 n.30. In *Butz*, the Court rejected the argument that absolute immunity should be denied because

the individuals were employed in the Executive Branch, reasoning that "[j]udges have absolute immunity not because of their particular location within the Government but because of the special nature of their responsibilities." *Butz*, 438 U.S. at 511. As the Court noted in *Lake Country Estates*, "[t]his reasoning also applies to legislators." 440 U.S. at 405 n.30.

Precisely the same approach was followed in *Supreme Ct. of Va.*, where the Court rejected arguments compartmentalizing officials based only on their positions in a particular branch of government. 446 U.S. at 733-734. In *Supreme Ct. of Va.*, the plaintiffs challenged provisions of the Virginia bar code which had been promulgated by the Virginia Supreme Court pursuant to rulemaking authority delegated to the court by the Virginia legislature, and sought to hold the individual members of the court personally liable for their attorneys' fees. *Id.* at 721-722. The Court recognized that if the state legislators had enacted the bar code and suit had been brought against them, the state legislators would have been entitled to absolute immunity. *Id.* at 733-734. The Court reasoned that the state court judges were entitled to the same absolute immunity because they had effectively functioned as members of the state legislature in issuing the bar code. *Id.* at 734.

In sum, the principle of absolute immunity for legislators and those functioning as legislators is well-grounded in history and reason. Recognizing this and following a functional approach, this Court has applied it to every level of government for which the question has been presented for review.

**B. All Post-Lake Country Estates Caselaw Has Held Municipal Legislators Absolutely Immune From Suit For Actions Taken In Their Legislative Capacity.**

All United States Circuit Courts of Appeals have considered the question following *Lake Country Estates* and all have held that municipal legislators are entitled to the same absolute immunity as their federal, state and regional counterparts. In a striking measure of unanimity, all the circuit courts' decisions have been the product of a unanimous panel. *See*,

*e.g.*, *Fry v. Board of County Comm'rs*, 7 F.3d 936, 942 (10th Cir. 1993); *Acevedo-Cordero v. Cordero-Santiago*, 958 F.2d 20, 22-23 (1st Cir. 1992); *Goldberg v. Rocky Hill*, 973 F.2d 70, 72 (2d Cir. 1992) (*dicta*); *Gross v. Winter*, 876 F.2d 165, 169 (D.C. Cir. 1989); *Haskell v. Washington Township*, 864 F.2d 1266, 1277 (6th Cir. 1988), *appeal after remand*, 891 F.2d 132 (6th Cir. 1989); *Aitchison*, 708 F.2d at 98-99; *Reed v. Shorewood*, 704 F.2d 943, 952-953 (7th Cir. 1983); *Espanola Way Corp. v. Meyerson*, 690 F.2d 827, 829 (11th Cir. 1982), *cert. denied*, 460 U.S. 1039 (1983); *Kuzinich v. Santa Clara*, 689 F.2d 1345, 1349-1350 (9th Cir. 1982); *Hernandez v. Lafayette*, 643 F.2d 1188, 1193 (5th Cir. 1980), *cert. denied*, 455 U.S. 907 (1982), *appeal after remand*, 699 F.2d 734 (5th Cir. 1983); *Bruce v. Riddle*, 631 F.2d 272, 279 (4th Cir. 1980); *Gorman Towers, Inc. v. Bogoslavsky*, 626 F.2d 607, 611-614 (8th Cir. 1980).<sup>9</sup>

This Court, while never called upon to decide the precise question, has also given clear indications that it too believes this is the correct result. The difficulty of reaching a *contrary* result was enunciated by Justice Marshall in his dissenting opinion in *Lake Country Estates*, 440 U.S. at 407 (Marshall, J., dissenting). As observed by Justice Marshall:

[T]he majority's reasoning in this case leaves little room to argue that municipal legislators stand on a different footing than their regional counterparts. Surely, the Court's supposition that the "cost and inconvenience and distractions of a trial" will impede officials in the "uninhibited discharge of their legislative duty," *ante*, at 405, quoting *Tenney v. Brandhove*, *supra* at 377, applies with equal force whether the officials occupy local or regional positions.

*Id.* at 407-408 (Marshall, J., dissenting).

<sup>9</sup> In fact, courts faced with nearly identical situations, *i.e.*, the elimination of a position in the context of the municipalities formulation of its budget policies, have concluded that the local officials were performing traditional legislative functions entitling them to absolute immunity from suit. *See infra*, Part II(B)(1).



In *Owen v. City of Independence*, 445 U.S. 622, 625-630 (1980), the plaintiff had been discharged by the City of Independence from his position as chief of police and brought suit against the city under § 1983. The Court ruled that the municipality itself did not enjoy immunity from suit. *Id.* at 638. In dissenting from this ruling, Justice Powell, joined by three other justices, stated flatly that, as to an individual councilperson, Paul Roberts, who was a particular antagonist of the plaintiff: "Roberts himself enjoyed absolute immunity from Section 1983 suits for acts taken in his legislative capacity." *Id.* at 664 n.6 (Powell, J., dissenting) (citing *Lake Country Estates*, 440 U.S. at 402-406).

Most recently, in *Spallone v. United States*, 493 U.S. 265, 267 (1990), the Court ruled that the district court had abused its discretion by holding four Yonkers city council members in contempt for refusing to vote in favor of legislation implementing a consent decree earlier approved by the city. Writing for the majority, Chief Justice Rehnquist noted that state legislators had been held to enjoy an absolute privilege in *Tenney*, and that the same doctrine of legislative immunity had subsequently been applied to regional legislators in *Lake Country Estates* and to actions for both damages and injunctive relief in *Supreme Ct. of Va.* *Id.* at 278-279. While noting that these cases did not control the question *sub judice*, i.e., whether local legislators should be immune from contempt sanctions imposed for failure to vote in favor of a particular legislative bill, the Court observed that "some of the same considerations on which the immunity doctrine is based must inform the District Court's exercise of its discretion in a case such as this." *Id.* at 278. The Court then discussed the same principles which undergird the rule of absolute immunity for legislators at both the state and regional levels in its discussion of the contempt order against the municipal legislators, including the historical underpinnings of the absolute legislative privilege and the concern that "any restrictions on a legislator's freedom undermines the 'public good' by interfering with the rights of the people to representation in the democratic process." *Id.* at 279 (citing *Lake Country Estates*, 440 U.S. at 404-405; *Tenney*, 341 U.S. at 377.) At no time did

either the majority or minority opinions in *Spallone* suggest that those fundamental principles might be inapplicable, or entitled to any less weight, because the individual defendants were local, rather than state or federal, legislators.

**C. The Same Principles Which Undergird Absolute Legislative Immunity At Other Levels Of Government Apply At The Municipal Level.**

**1. The historical basis for absolute legislative immunity has equal applicability to municipal legislators.**

As noted, *supra*, the principle of absolute immunity for legislators goes back to 16th- and 17th-century England. It was consistently recognized in the common law and "was taken as a matter of course by our Nation's founders." *Lake Country Estates*, 440 U.S. at 403; accord *Tenney*, 341 U.S. at 372-375. The principle was never limited to particular levels of our government, whether federal, state, regional or municipal. To the contrary, our historical heritage is that the immunity applies to legislators and to those performing legislative functions generally.

Nor is there anything to suggest that, by the time Congress enacted § 1983 in 1871, municipal legislators had come to be viewed as *sui generis* and, therefore, not entitled to the same absolute immunity enjoyed by legislators at other levels of government. In a case decided the same decade that § 1983 was passed, *Jones v. Loving*, 55 Miss. 109, 30 Am. Rep. 508 (1877), the plaintiff attempted to sue town aldermen personally for their role in the passage of an ordinance which, he alleged, "unlawfully and maliciously deprived him of his legal rights, fees, privileges, and emoluments, and of his office of mayor. . . ." *Jones*, 55 Miss. at 111. The court sustained the defendants' demurrer, stating that "[i]t is impossible to perceive upon what theory such a suit can be maintained." *Id.* The court went on to discuss what it clearly perceived to be well-settled principles of law:

If the ordinance was within the authority of the board, certainly the individual members of it cannot

be made personally liable for a mistaken exercise of their powers; nor is it possible in such a case to inquire into the motives which prompted their action. . . .

It certainly cannot be argued that the motives of the individual members of a legislative assembly, in voting for a particular law, can be inquired into, and its supporters be made personally liable, upon an allegation that they acted maliciously towards the person aggrieved by the passage of the law. Whenever the officers of a municipal corporation are vested with legislative powers, they hold and exercise them for the public good, and are clothed with all the immunities of government, and are exempt from all liability for their mistaken use.

*Id.* (internal citations omitted).<sup>10</sup>

*Jones* appears to state the widely held view at the time that local legislators were entitled to absolute immunity for their legislative acts. *See, e.g., Hill v. Board of Alderman*, 72 N.C. 63, 65 (1875); *County Comm'rs of Anne Arundel v. Duckett*, 20 Md. 468, 477, 479 (1863); *Wilson v. New York*, 1 Denio 595, 599 (N.Y. 1845).

Moreover, in 1881, the author of a comprehensive treatise on municipal law described the same principle of immunity from suit in a way which made it appear equally well-settled, observing that: "Where the officers of a municipal corporation are invested with legislative powers, they are exempt from individual liability for the passage of any ordinance within their authority, and their motives in reference

<sup>10</sup> In addition, counsel for the defendants represented to the court in *Jones* that:

No reported case can be found in which the members of the Legislature of a state, or even the officers of a municipal corporation, were sued for legislative acts, whether they were unconstitutional, oppressive, malicious, or corrupt. That judicial officers are not liable for errors of judgment is a proposition too well settled to be argued here.

*Id.* at 110 (internal citations omitted).

thereto will not be inquired into; nor are they individually liable for the passage of any ordinance not authorized by their powers; for such ordinance is void and need not be obeyed." 1 J. Dillon, *Law of Municipal Corporations*, § 313 pp. 326-327 (3d ed. 1881) (emphasis in original); *see also* T. Cooley, *A Treatise on the Law of Torts or the Wrongs Which Arise Independent of Contract*, 376, 377 (1880); J. Bishop, *Commentaries on the Non-Contract Law*, § 744 (1889); F. Mechem, *A Treatise on the Law of Public Offices and Officers*, § 646 (1890).

The holding that "§ 1983 'does not create civil liability' for acts unknown 'in a field where legislators traditionally have power to act,' " *Supreme Ct. of Va.*, 446 U.S. at 732-733 (quoting *Tenney*, 341 U.S. at 379), thus has fully as much applicability to municipal legislators as to their counterparts in other levels of government. There is no historical support for a view that they were ever considered *sui generis*, and this Court's review of the historical underpinnings for the rule of absolute legislative immunity have never been narrowly limited to a single form of legislative body. There is also nothing in the legislative history to § 1983 to suggest that Congress intended that a different approach should apply to legislators at the municipal level. *See generally* Congr. Globe, 42d Congr., 1st Session. For all of these reasons, the historical basis for absolute legislative immunity has equal applicability to municipal legislators.

**2. Municipal legislators perform the same functions as their counterparts in other levels of government and absolute immunity for them is equally well-grounded in reason.**

As noted above, whether a particular official is entitled to absolute immunity derives not from his or her title or position, but rather from the functions with which the official has been lawfully entrusted, and the effect which exposure to particular forms of liability would have on the appropriate exercise of those functions. *Buckley*, 509 U.S. at 268-269; *Forrester*, 484 U.S. at 224; *Butz*, 438 U.S. at 511; *Lake Country Estates*, 390 U.S. at 405. Municipal legislators perform the same kinds of functions as legislators at other levels



of government, and their need for absolute immunity is equally well-grounded in reason. *See generally, supra*, Part I(A)(1).

Municipal legislators carry out the same kinds of functions as legislators at other levels of government for whom absolute immunity has been specifically recognized. Like the Individual Defendants in the instant case, many municipal legislators perform necessary legislative functions which have been expressly delegated to them by state constitutions and statutes. *See, e.g.*, Ariz. Const., art. XIII, §§ 2, 3; Cal. Const., art. XI, § 6 *et seq.*; Ga. Const., art. IX, § 2, ¶ 2; Kan. Const., art. 12, § 5; La. Const., art VI, § 5; Mass. Const., amend. art. II, §§ 1, 6, 7; N.H. Rev. Stat. Ann. § 40-A-1; N.J. Rev. Stat. § 40:42:1 *et seq.* To carry out these functions, local governments may adopt, amend or repeal local ordinances or by-laws. *See id.* These powers are necessarily limited and extend only so far as the state delegates its authority in a particular area. *See* Mass. Const., amend. art. II, § 6. For example, local legislative bodies enacting budgetary legislation often act pursuant to state statutes delegating to them certain legislative and policy making functions. *See, e.g.*, Mass Gen. Laws Ann. ch. 44, § 32; Conn. Gen. Stat. § 7-148. As such, local officials essentially function like members of the state legislature when performing these tasks. *See Ryan v. Burlington County*, 889, F.2d 1286, 1290 (3d Cir. 1989) ("It is only with respect to the legislative powers delegated to them by the state legislatures that the members of local governing boards are entitled to absolute immunity.")

Clearly, state legislators involved in the enactment of budgetary legislation would be entitled to absolute immunity for actions taken in that process. *See Tenney*, 341 U.S. at 376. Officials performing such functions should not be exposed to personal liability simply because they are performing them at the local level. *See Supreme Ct. of Va.*, 446 U.S. at 721-722, 733-734; *Butz*, 438 U.S. at 511-512; *Gravel v. United States*, 408 U.S. 606, 616-617, 618 (1972). *Cf. Barr v. Mateo*, 360 U.S. 564, 573 (1958) ("The complexities and magnitude of government activity have become so great that there must of necessity be a delegation and redelegation of authority as to many functions, and we cannot say that these functions become

less important simply because they are exercised by officers of lower rank in the executive hierarchy."); *Harlow*, 457 U.S. at 823 (Burger, J., dissenting) (noting that Court has adopted a functional approach to legislative immunity at the federal level, adopting "a functional analysis of the legislative process in the context of the Constitution taken as a whole and in light of 20th-century realities").

Absolute immunity for municipal legislators is also as well grounded in reason as it is for their counterparts at other levels of government. As is true at the federal, state, and regional level, the protections afforded by absolute immunity enhance the integrity of the legislative process at the local level. While the exact configuration of the governing entities is different, at all these levels, the legislative process is intended to encompass debate and compromise regarding the will of the people and the best means for effectuating that will. Legislators must be free to exercise their discretion and decisionmaking authority guided by what is best for their constituents and community, rather than by fear of personal liability. *See Lake Country Estates*, 440 U.S. at 404-405; *see also Spallone*, 493 U.S. at 279 ("[A]ny restriction on a legislator's freedom undermines the 'public good' by interfering with the rights of the people to representation in the democratic process.").

The related concerns of "decision distortion" and "time and energy distraction" are just as compelling at the municipal level. Local officials live among their constituents and often interact with the electorate on a daily basis. The relationship is often personal and familiar. Indeed, given this proximity, the potential for vindictive litigation and the need to protect the freedom of these legislators to engage in the normal legislative process is, if anything, accentuated. *See Gorman Towers*, 626 F.2d at 612 (" 'because municipal legislators are closer to their constituents than either their state or federal counterparts, they are, perhaps, the most vulnerable to and least able to defend lawsuits caused by the passage of legislation.' ") (quoting *Ligon v. Maryland*, 448 F. Supp. 935, 947 (D. Md. 1977)); *see also Dusanenko*, 560 F. Supp. at 826, 827. Moreover, unlike state and federal officials, many local officials are part-time public servants, giving their free time to govern locally. The

chilling effect of exposing these officials to liability for their legislative functions is therefore increased at the local level because the compensation for such service would be substantially outweighed by the potential for exposure to personal liability.

In short, local legislators are effectively responsible for the same functions as their federal, state and regional counterparts. The reasons which support immunity for legislators at those levels apply equally to legislators at the local level. They should, therefore, enjoy the same absolute immunity from suit.

### 3. The same checks apply to municipal legislators as to their counterparts at other levels of government.

The same checks on unconstitutional conduct also apply to municipal legislators as to their counterparts at other levels of government. As with state and federal legislators, local officials must stand for election. Constituents who are dissatisfied with the manner in which they exercise their authority may always resort to the ballot box. *See Tenney*, 341 U.S. at 378 (control by the voters is an important restraint on unconstitutional acts by state legislators); *Rateree*, 852 F.2d at 951; *Dusanenko*, 560 F. Supp. at 827. The existence of this check on the actions taken by local officials is persuasive evidence that they should be entitled to absolute immunity. *See Tenney*, 341 U.S. at 378; *Gorman Towers*, 626 F.2d at 613. In this respect, the justification for extending absolute immunity to local elected officials is considerably stronger than in *Lake Country Estates*, where the Court held that appointed members of a regional planning board were entitled to absolute immunity when performing legislative functions.

Additionally, individuals who believe their civil rights have been violated by the enactment of unconstitutional legislation may pursue remedies against the municipality itself. *See Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 166 (1993) (no municipal

immunity); *Owen*, 445 U.S. at 638; *Monell*, 436 U.S. at 663.<sup>11</sup> Thus, unlike most plaintiffs alleging injury by state governmental actors, plaintiffs allegedly injured by the implementation or execution of municipal policy may sue the municipal entity itself, pursuant to § 1983, for monetary, declaratory and injunctive relief. *See Monell*, 436 U.S. at 663; *see also supra*, note 8. Willful deprivations of constitutional rights by municipal officials under color of state law also remain punishable under 18 U.S.C. § 242.

Further, the absence of any immunity for city government not only provides an effective remedy for wronged individuals; it also provides an additional check on unlawful behavior by municipal legislators. As noted by the Court in *Owen v. City of Independence*, "[t]he knowledge that a municipality will be liable for all of its injurious conduct, whether committed in good faith or not, should create an incentive for officials who may harbor doubts about the lawfulness of their intended action to err on the side of protecting citizens' constitutional rights." 445 U.S. at 651-652; *accord Spallone*, 493 U.S. at 280 (noting that the prospects of a "bankrupting fine" against the municipal entity would likely influence the actions of individual city councilpersons.).

In other settings, this Court has recognized the necessity of absolute immunity for individuals as to whom such checks may be lacking. *See, e.g., Imbler*, 424 U.S. at 417-419; *Pierson v. Ray*, 386 U.S. 547, 553-554 (1967). In these cases, the Court has concluded that it is "better to leave undressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation." *Imbler*, 424 U.S. at 428 (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (L. Hand, J.), *cert. denied*, 339 U.S. 949 (1950)); *see also Burns*, 500 U.S. at 484. The availability of meaningful checks for municipal

<sup>11</sup> If a party does not have an action against a municipal entity because the legislation that was the subject of the challenge was itself lawful, this also means that the party should have no cause of action against the individuals who passed the lawful legislation. *See infra*, Part III.



legislators makes their entitlement to absolute immunity still more compelling.

## II. LOCAL LEGISLATIVE OFFICIALS ARE ENTITLED TO ABSOLUTE IMMUNITY WHEN THEY PROPOSE AND ENACT A LOCAL ORDINANCE RELATED TO THE LOCAL GOVERNMENTAL BUDGET REGARDLESS OF THEIR MOTIVATIONS.

Massachusetts General Laws Chapter 43, section 55, applicable to cities and towns adopting Plan A form of municipal government, outlines the procedure for the proper passage of ordinances. *See* Mass. Gen. L. Ann. ch. 43, § 55 (1994). It is undisputed that the Mayor and the City Council followed these procedures in adopting the position-elimination ordinance. *See J.A.* at 47-56. Likewise, it is undisputed that the Mayor and City Council followed the proper procedure for the proposal and adoption of the municipal budget as outlined in Chapter 44, section 32 of the Massachusetts General Laws. *See id.*; *see also* Mass. Gen. L. Ann. ch. 44, § 32 (1994). The only challenged actions by Mayor Bogan and Councillor Roderick are those undertaken as part of these two processes. *See J.A.* at 47-56; *Opposition to Petition for Certiorari* (hereinafter "*Opp.*") at 16 n.2. Thus, contrary to the decision of the First Circuit, this challenged conduct falls comfortably within the realm of traditionally legislative functions, entitling both individuals to absolute immunity, regardless of their motives.

### A. The First Circuit Erroneously Considered The Individual Defendants' Motives.

Individual personal motivations are irrelevant to whether particular officials are performing legislative functions and therefore entitled to absolute immunity. *Tenney*, 341 U.S. at 377. Whether officials are entitled to the protections of absolute immunity is controlled by the function the official was performing at the time they took the challenged actions. *Forrester*, 484 U.S. at 224. Specifically in the legislative

context, this determination requires an assessment of whether the challenged actions are traditionally legislative functions (for which there is absolute immunity), or merely administrative functions (for which there may only be qualified immunity). *See Supreme Ct. of Va.*, 446 U.S. at 731; *Tenney*, 341 U.S. at 376; *see also Forrester*, 484 U.S. at 224. Under this functional approach, an individual's personal motivations for taking the challenged action are outside the scope of the relevant inquiry. *Tenney*, 341 U.S. at 377.

Were there any doubt that this were true, this Court's decision in *Tenney* eliminated any possible ambiguity. *Id.* While noting that the immunity available to legislators is not limitless, this Court stated: "[t]he claim of an unworthy purpose does not destroy the privilege. . . . The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives." *Id.* (emphasis added). Moreover, the Court made clear that the judicial arena was not the proper forum to consider the motives of policy makers engaged in legitimate legislative activity. *Id.*; *see also United States v. Brewster*, 408 U.S. 501, 525 (1971). Justice Frankfurter, writing for the majority in *Tenney*, stated:

*In times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed. Courts are not the place for such controversies. Self-discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses. The courts should not go beyond the narrow confines of determining that a committee's inquiry may fairly be deemed within its province.*

*Tenney*, 341 U.S. at 378 (emphasis added); *see also Eastland v. United States Servicemens' Fund*, 421 U.S. 491, 508 (1975); *Fletcher v. Peck*, 6 Cranch 87, 131, 10 U.S. 87 (1810) ("If the title be plainly deduced from a legislative act, which the legislature might constitutionally pass, if the act be clothed with all the requisite forms of a law, a court, sitting as a court of law, cannot sustain a suit brought by one individual

against another founded on the allegation that the act is a nullity, in consequence of the impure motives which influenced certain members of the legislature that passed the law.")<sup>12</sup>

Noting that the parties asserted different motivations for the proposed ordinance, *i.e.*, budgetary constraints vs. retaliation for the exercise of First Amendment rights, the First Circuit concluded that "conflicted evidence as to the *defendants' true motives* raised genuine issues of material fact" precluding a determination regarding the applicability of absolute immunity. *Pet. App.* at 65 (emphasis added). In addition, the First Circuit held that the Individual Defendants were properly denied absolute immunity, based on two findings by the jury: (1) the defendants' [all three defendants] stated reason for enacting the Ordinance was not their real reason; and (2) Scott-Harris' protected speech was a substantial or motivating factor in the actions by the Individual Defendants relating to the Ordinance. *See id.* at 66; *see also id.* at 70-71 (discussing sufficiency of the evidence against Roderick and Bogan, noting specifically their alleged motivation for proposing and enacting the Ordinance). The court also articulated the distinction between legislative and administrative functions in terms of the nature of the facts used to reach the decision as well as the particularity of the impact of the official action. *Id.* at 64-65. By elevating these factors to the forefront of its analysis, the court necessarily (and impermissibly) forced an inquiry into the motivations of the individual legislators. *See id.* at 64-65, 66.

<sup>12</sup> As noted by Justice Frankfurter, no case has called into question the basic understanding "that it is not consonant with our scheme of government for a court to inquire into the motives of legislators," since that principle was first articulated nearly 200 years ago. *Tenney*, 341 U.S. at 377 (citing *Fletcher*, 6 Cranch at 130.) Circuit courts have also acknowledged the continued viability of this basic principle since *Tenney*. *See, e.g., Fry*, 7 F.3d at 942; *Brown v. Collins*, 937 F.2d 175, 174 (5th Cir. 1991); *Rateree*, 852 F.2d at 951; *Aitchison*, 708 F.2d at 98; *Bruce*, 631 F.2d at 280; *see also Drayton v. Mayor & Council of Rockville*, 699 F. Supp. 1155, 1156 (D. Md. 1988), *aff'd*, 885 F.2d 864 (4th Cir. 1989).

Thus, the court looked behind a facially neutral, position-elimination ordinance, enacted as part of the City's budgetary process, to conclude that the Individual Defendants' actions were functionally administrative, not legislative, grounded purely on their allegedly improper motivations. *See id.* In so doing, the First Circuit reformulated the functional immunity analysis by using the Individual Defendants' motivations as the controlling factor. This reformulation of the standard is clearly contrary to this Court's pronouncements regarding absolute immunity and undermines the precise purpose that immunity was intended to serve. *See Eastland*, 421 U.S. at 508-509; *Tenney*, 341 U.S. at 377. *Cf. Butz*, 438 U.S. at 520 (Rehnquist, J., concurring and dissenting) ("It amounts to saying that an official has immunity until someone alleges he has acted unconstitutionally. But that is no immunity at all: The 'immunity' disappears at the very moment when it is needed. The critical inquiry in determining whether an official is entitled to claim immunity is not whether someone has in fact been injured by his action; that is part of the plaintiff's case in chief.")

Additionally, because the First Circuit emphasized motive and there were factual disputes regarding the Individual Defendants' motivations, the court characterized Bogan's and Roderick's pretrial motions to dismiss the action on absolute legislative immunity grounds as "premature". *Pet. App.* at 65. In fact, however, absolute immunity is *intended* to be raised at the early stages of the litigation because its very purpose is to protect legislators "not only from the consequences of litigation's results, but also from the burden of defending themselves." *Supreme Ct. of Va.*, 446 U.S. at 731-732 (emphasis added); *accord Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985); *Imbler*, 424 U.S. at 419 n.13 (absolute immunity defeats a suit at the outset, so long as the official's actions were within the scope of the immunity); *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967) ("legislators engaged in the sphere of legitimate legislative activity should be protected not only from the consequences of litigation's results but also from the burden of defending themselves" (internal quotations and citations omitted)); *see also Nixon v.*



*Fitzgerald*, 457 U.S. 731, 742 (1982) (denial of dismissal on the basis of absolute immunity is immediately appealable). By virtue of the fact that a plaintiff ordinarily pleads improper motive when alleging a civil rights action against individuals pursuant to § 1983, and it is generally considered inappropriate to resolve issues of motive at the summary judgment stage, every individual defendant would be forced to await the resolution of factual issues regarding their motivation prior to being entitled to absolute legislative immunity. Clearly, this is not what this Court intended absolute immunity to involve and, again, it eviscerates the precise protections absolute immunity was intended to provide. *See Supreme Ct. of Va.*, 446 U.S. at 731-732; *see also Mitchell*, 472 U.S. at 525.

The First Circuit's analysis is not only contrary to the longstanding standards of absolute immunity; it actually results in transforming the standard for absolute legislative immunity into the standard for *qualified* immunity prior to this Court's decision in *Harlow v. Fitzgerald*, 457 U.S. 800 (1981). In *Harlow*, this Court recognized the adverse consequences for officials faced with rebutting allegations of "bad faith" in order to avail themselves of an immunity defense. *Id.* at 814-816. Contrary to the original intent of qualified immunity, the pre-*Harlow* standard "proved incompatible with [the Court's] admonition that insubstantial claims should not proceed to trial." *Id.* at 815-816; *accord Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam) (stressing importance of resolving questions of immunity at earliest possible stage); *Siegert v. Gilley*, 500 U.S. 226, 232-233 (1991) (Rehnquist, J.) (same). By forcing defendants to await the resolution of factual disputes which necessarily arise in resolving subjective good faith issues, officials are distracted from their governmental duties and inhibited in their discretionary actions, and able individuals are deterred from public office. *See Harlow*, 457 U.S. at 815-816. In particular this Court acknowledged the existence of "special costs to 'subjective' inquiries of this kind." *Id.* at 816. Noting that discretionary judgments are influenced by the decisionmakers' experiences, values and emotions, the Court observed that these variables

also frame a background in which there often is no clear end to the relevant evidence. Judicial inquiry into subjective motivation therefore may entail broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues. Inquiries of this kind can be peculiarly disruptive of effective government.

*Id.* at 816-817. The Court concluded, therefore, that the standard for qualified immunity, if it was to have any meaning at all, necessarily required the elimination of the subjective good faith element. *Id.* at 817.

The costs identified in *Harlow* as associated with a subjective intent element in the immunity analysis are equally applicable to the legislative context. *See supra*, Part I. Legislators forced to await the resolution of factual issues will be distracted from the business before them and inhibited from freely exercising policy making decisions, and qualified individuals will be deterred from serving the public as legislators due to the costs associated with mounting a defense to possible suits. *See id.* The First Circuit's infusion of a subjective element into the absolute immunity analysis, therefore, creates the very problems that *Harlow* sought to avoid in the qualified immunity context. Thus, the net effect of the First Circuit's approach is a reordering of the levels of protection available from absolute and qualified immunity. According to the First Circuit, the *most* protective form of immunity encompasses elements which were found by this Court to undermine the protections afforded by a *less* expansive form of immunity. Surely if consideration of subjective intent in the context of qualified immunity undermines its intended protection and essential purposes, consideration of those same elements can do no less damage in eviscerating the protections afforded by absolute immunity.

Based on the foregoing, the First Circuit erred in affirming the district court's denial of the Individual Defendants' motions to dismiss on the grounds that they were entitled to absolute immunity. The court's reliance on the Individual Defendants' alleged personal motivations for the proposal and

enactment of the position-elimination ordinance for its conclusion that the individuals were performing administrative not legislative functions, contravenes the established legal standard for absolute immunity and undermines the precise protection that absolute immunity was intended to provide.

**B. According To The Proper Standard Regarding Absolute Legislative Immunity, Both Bogan And Roderick Are Absolutely Immune For Their Actions Taken In The Process Of Enacting The Budgetary Ordinance.**

**1. Budgetmaking is a quintessentially legislative function.**

In its broadest sense, "traditional legislative function" signifies the formulation of prospective, legislative-type policies rather than enforcement or application of existing policies. *See Prentis v. Atlantic Coastline Co.*, 211 U.S. 210, 226 (1908) ("Legislation . . . looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power."). Legislative policy making, or "line-drawing", necessarily involves the balancing of social needs and rights of particular groups. The end result of that balancing, *i.e.*, an ordinance, by-law or policy, reflects the ordering of priorities for the community as a whole. Budgetmaking is indicative of the kind of line-drawing associated with legislative policy-making. "Ordering budget priorities is a complex process subject to many pressures and resulting in many compromises. Budgets are written to the clangor of many axes grinding. . . . Each line item in a budget may affect the interests of a few people intensely, but a budget expresses general policy by balancing the competing claims of hundreds of thousands of line items." *Rateree v. Rockett*, 630 F. Supp. 763, 771 (N.D. Ill. 1986), *aff'd*, 852 F.2d 946 (7th Cir. 1988).

The position-elimination ordinance passed by the City was intimately related to the budgetary policy making of the City. Based on a balancing of the particular needs of the City and its constituents, the City, through its budgetmaking

power, assessed available alternatives for dealing with the potential substantial cut in state aid. As a result of this process, the City formulated a budget which eliminated a number of positions and froze all City employees' salaries. The municipal government was also restructured, returning the Public Health Department, the Council on Aging, the Department of Veterans' Affairs to independent department status, and reorganizing the Building and Code Enforcement Department under the City Administrator. As a part of this reorganization, DHHS was eliminated and, thereby, the position of Administrator of DHHS, filled by Scott-Harris, was eliminated.

There was nothing unique or unusual about this result. "Almost all budget decisions have an effect on employment by either creating or eliminating positions or by raising or lowering salaries. . . . [These employment decisions, however,] are not 'employment decisions' at all but instead, legislative, public policy choices that necessarily impact on the employment policies of the governing body." *Rateree*, 852 F.2d at 950; *accord Alexander v. Holden*, 66 F.3d 62, 65 (4th Cir. 1995). Moreover, while other positions could have been eliminated, or other services and programs cut to achieve the same net savings for the City, that reality only demonstrates that there are a multitude of permutations of the order of priorities from which the City's policy makers could choose.<sup>13</sup> The existence of alternative policy formulations demonstrates, rather than undermines, the prospective, policy making nature of the actions.<sup>14</sup>

<sup>13</sup> This is clearly illustrated in the present case, where each department head was required to submit a proposed set of budget cuts and Scott-Harris submitted proposals which included reducing the hours of nurses at schools and senior homes. Preferring not to cut front-line services, Mayor Bogan instead proposed, and a majority of the City Council accepted, the restructuring of DHHS and the elimination of the position of Administrator.

<sup>14</sup> At trial and on appeal, Scott-Harris made much of the fact that the City may not have saved any money as a result of the elimination of



In fact, the Third, Fourth, Seventh, and District of Columbia Circuits, as well as district courts from the Second, Ninth and Tenth circuits, have directly addressed the issue of the entitlement of municipal officials to absolute immunity in the context presented here, *i.e.*, the passage of position-elimination ordinances, and have concluded that the local officials were performing traditionally legislative functions entitling them to absolute immunity from suit. *See, e.g., Carver v. Foerster*, 102 F.3d 96, 100 (3d Cir. 1996) (elimination of government position is legislative, but unilateral order to fire someone is not); *Alexander*, 66 F.3d at 65 (budgetary decisions which may necessarily impact on employment are generally legislative acts); *Roberson v. Mullins*, 29 F.3d 133, 135 (4th Cir. 1994) (termination of employee without eliminating position is unrelated to process of adopting prospective, legislative-type rules and therefore is not shielded by absolute immunity doctrine); *Gross*, 876 F.2d at 172 n.10 (personnel actions flowing from traditional legislative functions like budget decisions are the type of actions for which legislators enjoy absolute immunity); *Rateree*, 852 F.2d at 950 (budgetmaking is quintessentially legislative function and job loss as a result of budget process does not make act administrative); *Aitchison*, 708 F.2d at 98 (mayor entitled to legislative immunity for act of voting to pass ordinance eliminating

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DHHS. The First Circuit also noted this fact. *Pet. App.* at 70 n.18. The fact that the City may not have ended up actually saving money, however, does not vitiate the legislative character of the decision. *See Drayton*, 699 F. Supp. at 1157 (D. Md. 1988), *aff'd*, 885 F.2d 864 (4th Cir. 1989). Poor policy choices by any legislature are not for the Court to second guess. *See Eastland*, 421 U.S. at 509 ("The wisdom of congressional approach or methodology is not open to judicial veto.") To hold two individuals involved in the collaborative legislative process personally liable for what may turn out to be poor policy is a usurpation of the legislative process. Not every bill passed reaches the goals it set out to achieve wisely and effectively, but this cannot, in a government with separate branches exercising distinct powers, be the sole basis for holding these individuals personally liable. The proper forum for correcting potentially erroneous legislative policy is clearly the ballot box.

plaintiff's position, regardless of claim of any unworthy purpose); *Rabkin v. Dean*, 856 F. Supp. 543, 547 (N.D. Cal. 1994) (legislative votes affecting positions and salaries of city employees are consistently interpreted as legislative acts); *Racine v. Cecil County*, 843 F. Supp. 53, 54-55 (D. Md. 1994) (position elimination and therefore entitled to absolute immunity); *Orange v. County of Suffolk*, 830 F. Supp. 701, 705 (E.D.N.Y. 1993) (resolution aimed at broad policy goals of streamlining, reorganizing and rolling back costs of department through elimination of positions is legislative act entitling defendants to absolute immunity); *Drayton*, 699 F. Supp. at 1156 (job elimination through budgetary process is a legislative act entitled to absolute immunity regardless of alleged discriminatory motives); *Herbst v. Daukas*, 701 F. Supp. 964, 968 (D. Conn. 1988) (decision to hire or fire generally considered administrative, the abolition of municipal positions constitutes a legislative act); *Ditch v. Board of County Comm'rs*, 650 F. Supp. 1245, 1250 (D. Kan. 1986) (elimination of a program or job title is a formulation of policy and therefore entitled to absolute immunity), *amended on other grounds*, 669 F. Supp. 1553 (D. Kan. 1987); *Dusanenko*, 560 F. Supp. at 827 (absolute immunity applied to decision by town officials to reduce salaries); *Goldberg v. Spring Valley*, 538 F. Supp. 646, 650 (S.D.N.Y. 1982) (individual trustees who approved mayor's action which resulted in elimination of plaintiff's position were entitled to absolute immunity); *see also Berkley v. Common Council of City of Charleston*, 63 F.3d 295, 302 (4th Cir. 1995) (council decision to deny salary increases as part of enacting annual budget was a core legislative function), *cert. denied*, 116 S. Ct. 775 (1996); *Healey v. Pembroke*, 831 F.2d 989, 993 (11th Cir. 1987).

The implications of a contrary rule could result in potential fiscal mismanagement by many local governments as well as the usurpation of the legislators' faithful representation of the interests of their constituents. If action by local officials to eliminate positions in the context of formulating and enacting a municipal budget are not protected by absolute immunity, every time local legislators enacted position-elimination

ordinances for fiscally sound reasons, they would subject themselves to personal suit. Taken to its logical end, council members would be inhibited from exercising their budgetary policy making function and would be inhibited from eliminating positions even though it may be fiscally sound for the city to do so. It is clearly in the public interest to ensure that local government officials exercise freedom of judgment when enacting budgetary legislation, including position-elimination legislation.

**2. The limited impact of the position-elimination ordinance is not the controlling factor.**

In many cases, as in the present case, the legislation at issue impacts only a handful of individuals. *See, e.g., Rateree*, 852 F.2d at 950-951; *Aitchison*, 708 F.2d at 98; *Rabkin*, 856 F. Supp. at 547; *Ditch*, 650 F. Supp. at 1248; *Dusanenko*, 560 F. Supp. at 823, 827. The scope of the act's impact, however, is not the focus of the immunity inquiry; rather the *function* performed must be the focus. *See Forrester*, 484 U.S. at 224. To hinge absolute immunity on the breadth of the impact of the policy prohibits clear demarcation of where immunity's protections begin and end. Without such demarcation, officials will experience the pressure of threatened litigation just as greatly as if there were no absolute immunity at all. *See Acierno v. Cloutier*, 40 F.3d 597, 613 (3d Cir. 1994) ("a blind adherence to the principle that legislation affecting a single property or owner is administrative rather than legislative would eviscerate the overarching aim of protecting local legislators from suit under the absolute immunity doctrine when making broad policy decisions to further the communities in which they live."); *Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 579 (9th Cir. 1984) (same), *cert. denied*, 471 U.S. 1054 (1985).

This is particularly true with regard to the local budget-making process. "Budgetmaking is a quintessential legislative function, reflecting the legislators' ordering of policy priorities in the face of limited financial resources. When budgets are cut materially in an industry as labor intensive as that of

local government, some people will almost surely lose their jobs." *Rateree*, 630 F. Supp. at 771. Further, legislation by local governments necessarily may be limited in its impact by virtue of the size of the particular political subdivision. To permit the size of the particular municipality or county to dictate what is or is not legislative in function creates an arbitrary distinction unrelated to whether the function being performed is legislative in character. Thus, while providing local officials with the protective umbrella of absolute immunity, such a standard would, at the same time, deny them its use when it is most needed.

As the present case illustrates, it is also inherently misguided to focus on the impact of a specific ordinance in a vacuum. The reorganization of DHHS which resulted in the elimination of Scott-Harris' position was part of an overall budget process for the City. A total of 134 other positions were eliminated, resulting in the termination of twenty-seven other City employees. At least five administrative positions within the school department were also eliminated. To assert that the Ordinance which eliminated Scott-Harris' position was "administrative" because the Ordinance *itself* only focused on DHHS, creates an overly mechanistic and arbitrary distinction between administrative and legislative acts and, in so doing, blinks reality. *Cf. Calhoun v. St. Bernard Parish*, 937 F.2d 172, 174 (5th Cir. 1991) (rejecting distinctions between general and particularized ordinances in zoning context, concluding that both enactment of zoning code and "spot zoning" are legislative functions because both entail legislative judgments), *cert. denied*, 502 U.S. 1060 (1992).

**3. The challenged actions are actions traditionally associated with the legislative process.**

Not only were the challenged actions undertaken in the course of substantively legislative functions, but the actions themselves were indicative of traditionally legislative, rather than administrative, action. In order to ensure that absolute



legislative immunity truly serves its intended purpose, "legislative function" must include within its protective ambit the entire progression of actions necessary to the enactment of legislation. See *Gravel*, 408 U.S. at 625; *Tenney*, 341 U.S. at 367; *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927) (legislative function includes power of inquiry because legislative body cannot legislate effectively in the absence of information); *Coffin*, 4 Mass. at 27. Anything less than absolute immunity, at any point in the progression, could inhibit the free exchange necessary to the democratic policy making process. Cf. *Buckley*, 509 U.S. at 273 (noting that protection less than absolute immunity even at the initial stages of the judicial process could affect a prosecutor's performance throughout the judicial process). As such, the protective net of absolute immunity includes researching and investigating for the purpose of formulating new policies, proposing legislation, considering legislation, and enacting legislation through debating, compromising, voting, vetoing or signing. See, e.g., *Brewster*, 408 U.S. at 512, 514, 516, 516 n.10 (collecting cases); *Kilbourn*, 103 U.S. at 204; *Coffin*, 4 Mass. at 27; see also *Calhoun*, 937 F.2d at 174; *Larsen v. Early*, 842 F. Supp. 1310, 1313-1314 (D. Colo.), *aff'd*, 34 F.3d 1076 (10th Cir. 1994).

Bogan's challenged actions, i.e., the decision to propose the position-elimination ordinance as part of the budgetary process, the actual proposal of that ordinance, and signing the ordinance after passage by the city council, are typical legislative functions. See, e.g., *Calhoun*, 937 F.2d at 174 (individual defendant introduced zoning moratorium and entitled to absolute legislative immunity); *Aitchison*, 708 F.2d at 99 (mayor's vote established participation in the legislative process); *Larsen*, 842 F. Supp. at 1313-1314 (state senator entitled to absolute immunity for presentation of bill to fellow legislators; it was legislative function, regardless of fraud allegations).

[T]he decision whether or not to introduce legislation is one of the most purely legislative acts that there is. . . . such decisions are an important part of

the process by which legislators govern legislation . . . To conclude otherwise would require us to ignore the central purpose of the doctrine of legislative immunity. . . . When individuals can sue members of a legislative body to ensure that a certain piece of legislation is brought before that body for a vote, the process is no longer democratic.

*Yeldell v. Cooper Green Hosp., Inc., et al*, 956 F.2d 1056, 1063 (11th Cir. 1992). These principles are unchanged by Bogan's position in the executive branch of the local government. See *Forrester*, 484 U.S. at 224; *Supreme Ct. of Va.*, 446 U.S. at 734; *Butz*, 438 U.S. at 511, 512; see also *Aitchison*, 708 F.2d at 99.

Likewise, Bogan's challenged act of signing the ordinance into law was procedurally a traditionally legislative function. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 121 (1976) (Constitution does not contemplate complete separation of powers evidenced by the fact that "[t]he President is a participant in the law-making process by virtue of his authority to veto bills enacted by Congress."); *Edwards v. United States*, 286 U.S. 482, 491 (1932) (President's signing into law of bill passed by Congress is a legislative act); *Smiley v. Holm*, 285 U.S. 355, 373 (1932) (referring to law-making power of the state as including the power of gubernatorial veto); *Kilbourn*, 103 U.S. at 191 ("To these general propositions [regarding the separation of powers] there are in the Constitution of the United States some exceptions. One of these is that the President is so far *made a part of the legislative power*, that his assent is required to the enactment of all statutes and resolutions of Congress." (emphasis added)). As recognized by the Fifth Circuit in *Hernandez v. City of Lafayette*,

The mayor's veto, like the veto of the President or a state governor, is undeniably a part of the legislative process. It differs only that it takes place at the local level. When the mayor exercises his veto power, it constitutes the policy-making decision of an individual elected official. It is as much an exercise of legislative decision making as is the vote of a member of Congress, a state legislator, or a city councilman.

*Hernandez*, 643 F.2d at 1194; accord *Orange*, 830 F. Supp. at 706. Thus, Bogan is absolutely immune from suit in connection with his proposal of the Ordinance as well as his act of signing the Ordinance into law.

The challenged actions of Councillor Roderick also entitle her to absolute legislative immunity. During the budget preparation for Fiscal Year 1992, Councillor Roderick was Chairperson of the Ordinance Committee. *Pet. App.* at 7-8. In conjunction with the budget proposal, the Ordinance eliminating DHHS was submitted to the City Council and subsequently referred to the Ordinance Committee. *Id.* Councillor Roderick considered the Ordinance, along with other councillors, in committee and, by vote, presented the Ordinance to the full city council for consideration. *Id.* Councillor Roderick then cast a vote for the passage of the position-elimination ordinance, along with five other city councillors. *Id.* at 8. The Ordinance was thereby approved by the City Council in a six-to-two vote. *Id.* As such, regardless of whether Councillor Roderick voted against the Ordinance, or in favor of it, the Ordinance would have passed.

There can be no doubt that these actions are traditionally legislative functions. See, e.g., *Powell*, 395 U.S. at 502; *Kilbourn*, 103 U.S. at 204; *Chappell v. Robbins*, 73 F.3d 918, 921 (9th Cir. 1996) (state senator absolutely immune in civil RICO action for pushing for passage of legislation); *Smith v. Lomax*, 45 F.3d 402, 405 (11th Cir. 1995) (legislator's vote constitutes act of legislating and cloaks him or her with immunity if vote is cast for or against legislation); *Hernandez*, 643 F.2d at 1194.<sup>15</sup> In *Coffin v. Coffin*, the Supreme Judicial Court of Massachusetts specifically included "the giving of a vote" as a representative function protected by legislative immunity. 4 Mass. at 27; accord *Smith*, 45 F.3d at 405; *Hernandez*, 643 F.2d at 1194.

<sup>15</sup> The vote of the City Council was necessary because the City established DHHS by ordinance enacted by the City Council, and therefore, it could only be eliminated by ordinance. See *supra*, pp. 3-5.

### III. INDIVIDUAL MUNICIPAL OFFICIALS CANNOT BE THE PROXIMATE CAUSE OF ACTIONABLE INJURY WHERE THE OFFICIAL MUNICIPAL DECISIONMAKER LAWFULLY ENACTED A VALID MUNICIPAL BUDGETARY ORDINANCE.<sup>16</sup>

In a departure from established principles of traditional tort law, the First Circuit held that while the official decision making body lawfully enacted facially benign legislation, individual legislators could be found to be the proximate cause of the plaintiff's injury pursuant to § 1983, based *only* on their improper motivation. See *J.A.* at 69. The First Circuit's approach opens the door for courts to impose liability on individual legislators despite the existence of a superseding cause, i.e., the enactment of facially neutral legislation by the official decision maker absent any impermissible purpose or infusion of the individuals' allegedly improper motivations in the deliberative and collective decision making process. To sanction such an approach would impermissibly permit courts to hinder the enactment of proper, necessary, and fiscally sound legislation.

#### A. The First Circuit's Approach Is Contrary To The Law Of Proximate Causation.

As demonstrated by case law involving somewhat analogous § 1983 claims, the First Circuit's holding cannot stand. Specifically, these cases reflect a recognition, either explicit or implicit, that individual defendants may be liable under § 1983 *only* if: (a) the action challenged by the plaintiff was improper and (b) the individual defendants played a significant role in shaping or orchestrating the improper action. See, e.g., *Wagenmann v. Adams*, 829 F.2d 196 (1st Cir. 1987) (bail

<sup>16</sup> Should this Court conclude that Mr. Bogan and Ms. Roderick are entitled to absolute legislative immunity for their participation in the enactment of the position-elimination ordinance, the Court need not decide this last issue.



decision was improper because, absent the defendant police officer's misrepresentations, there was no basis for the bail; the defendant police officer "was in all probability the cause of the ruling" made by the clerk who set bail); *Springer v. Seamen*, 821 F.2d 871 (1st Cir. 1987) (summary judgment for individual defendants was deemed improper because, absent misconduct of the individual defendants, there was no basis for the termination decision and plaintiff's entire claim was that his termination was caused by the investigation); *Arnold v. International Business Machines, Corp.*, 637 F.2d 1350, 1355 (9th Cir. 1981) (if plaintiff could have pointed to evidence showing that individual defendants had some control or power over state actor, and had directed it to take certain action, there would have been a dispute of material fact on issue of proximate causation under § 1983); *Furtado v. Bishop*, 604 F.2d 80 (1st Cir. 1979) (two inmates were improperly transferred to segregated confinement because the defendant correctional officers submitted false reports and recommendations concerning them and confinement orders were specifically based upon the false reports), *cert. denied*, 444 U.S. 1035 (1980). In all of these cases, the evidence demonstrated that the ultimate decisionmakers were mere conduits of the defendants' unlawful motivations because they directly relied upon the individual defendants' improper information. Under these circumstances, a finding that the Individual Defendants' actions were the proximate cause of the plaintiffs' injuries was found proper.

In the present case, the wrong alleged by Scott-Harris was the elimination of her position through passage of the Ordinance. The ultimate decisionmaker with respect to the position-elimination ordinance was the City (defined as the Mayor and a majority of the City Council). Even assuming improper animus on the part of Bogan and Roderick, they could have been found to be the proximate cause of the position elimination *only if*: (a) the decision itself was unlawful, in that a majority of the City Councillors shared their improper animus; or (b) they "hoodwinked" a majority of the City Councillors into believing that the position should be

eliminated for budgetary reasons which, unbeknownst to the Councillors, were pretextual.

With respect to the first scenario, the First Circuit found that the enactment of the Ordinance itself was not unlawful in that a majority of the City Councillors did not share the alleged improper animus of Bogan and Roderick. *See Pet. App.* at 61. With respect to the second scenario, Scott-Harris chose not to present *any evidence* that Bogan or Roderick had attempted to "hoodwink" or "fool" a majority of the City Councillors in this fashion. *See id. App.* at 60-61. There was *no* evidence introduced that either of the individual defendants made any ongoing or improper efforts to induce other Councillors to act for illicit or impermissible reasons. *Id.* at 61.

If there was any evidence that Bogan and Roderick had attempted to "hoodwink" the Councillors, it would have been proper for the jury to determine whether this formed the basis for the City's decision. It would have been entirely possible and permissible for the jury to find that Bogan and Roderick's efforts were unpersuasive, and that a majority of the Councillors voted to eliminate Scott-Harris' position solely for budgetary reasons. In that event, the position-elimination decision would not have been improper, and Scott-Harris would have suffered no actionable injury.

*Wagenmann v. Adams* illustrates this point. The court in *Wagenmann* held that the jury properly found that the setting of bail at \$500 was excessive and that the defendant police officer was the proximate cause of the violation of plaintiff's right to be free from excessive bail. *Wagenmann*, 829 F.2d at 211-213. The defendant admitted to contacting the court clerk to set plaintiff's bail. *Id.* at 212. In doing so, the police officer recounted his version of the facts as well as his description of the charges. *Id.* He also characterized the plaintiff's access to a cash sum certain, which the court concluded "contributed materially to what eventuated with respect to bail." *Id.* The police officer was the court clerk's sole source of information about the arrest and the clerk exclusively relied on the facts and recommendation provided by the police officer in setting the plaintiff's bail. *Id.* As the court observed, the police

officer "did not merely arrest Wagenmann and then step aside, letting an independent judicial officer set bail. [He] did appreciably more, helping to shape, and exercising significant influence over, the bail decision." *Id.* If the defendant in that case had made the same misrepresentations, but the clerk had an independent basis upon which to set bail (*e.g.*, an independent report that the plaintiff had handguns in the hotel room), setting of the bail would not have been improper and the police officer could not have been the proximate cause of the injury. *See id.* at 212-213.

In the present case, therefore, the independent action of the official decisionmaker to enact a facially benign ordinance for proper reasons, must be a superseding cause severing the causal connection between the individual legislators' allegedly improper animus and Scott-Harris' alleged injury. There was no evidence that either Bogan or Roderick helped shape or exercised any influence over the other City Councillors' decision to vote in favor of the position-elimination ordinance. Moreover, there was no evidence that the action of the Ordinance Committee or the City Council were mere formalities. Under such circumstances, where the causal connection between the defendants' actions and the alleged constitutional deprivation is severed, there is no basis for imposing liability on individual legislators.

**B. The First Circuit's Approach To Proximate Causation Compensates Those Who Have Suffered No Actionable Injury.**

Absent evidence that the City Councillors voted to eliminate Scott-Harris' position either for constitutionally impermissible reasons or because they were "hoodwinked" by Bogan and Roderick into doing so, there is *no* record evidence that the position-elimination decision itself was improper. *See Pet. App.* at 60-63. More specifically, there is no evidence to support a finding that a majority of the City Councillors took action based upon any factors other than legitimate economic ones. *See id.* at 61. As a matter of law, therefore, neither Bogan nor Roderick could have been the *proximate* cause of

any *actionable* injury to Scott-Harris under these circumstances. *Cf. Douglas v. City of Jeanette, et al.*, 319 U.S. 157, 165 (1942) (*dicta*) ("If the ordinance had been held constitutional, petitioners could not complain of penalties which would have been but the consequences of their violation of a valid state law.")

The district court sought to avoid this anomalous result in its formulation of the special verdict form. *See J.A.* at 137-141. As outlined in the special verdict form and as articulated by the court in the jury charge, if the jurors found that the Ordinance was not only facially benign, but also that the City enacted the Ordinance for nondiscriminatory or non-retaliatory reasons, they were to go no further. *See id.* at 137-141, 200-201, 213. In other words, if the Ordinance was lawfully enacted by the City, the individuals involved in the collaborative and deliberative legislative process could not, as a matter of law, proximately cause any actionable injury.

The district court's approach was consistent with the requirements of § 1983. In particular, § 1983 holds liable those cloaked in the authority of state law who subject or cause to be subjected any person to the deprivation of certain enumerated rights. *See* 42 U.S.C. § 1983. The enactment of legislation necessarily requires the collective action of the legislative body. No individual legislator, on his or her own, can enact legislation, but rather, is dependent upon the action and will of other legislators. Thus, the single vote of a legislator or the mere introduction of proposed legislation cannot, by themselves, subject someone or cause someone to be subjected to a deprivation of their rights. Any alleged constitutional deprivation in the legislative context can only occur when the legislation has survived the deliberative and collaborative process to be enacted into law. To permit a plaintiff to pick out legislators based on their single vote and ascribe improper motivations to them for that vote as a basis for liability pursuant to § 1983, without more, circumvents, rather than establishes, the causal link between the challenged action, *i.e.*, the enactment of legislation, and the alleged injury, *i.e.*, the impermissible deprivation of rights.



Section 1983 was not designed to provide remedies to individuals adversely impacted by lawful legislation merely on the basis that one or two of the legislators involved in the legislative process secretly supported the legislators because of their improper animus towards those individuals. Contrary to the First Circuit's conclusion, therefore, Bogan and Roderick could not have caused any deprivation of Scott-Harris' rights merely by their participation in the enactment of lawful legislation even if they secretly harbored an improper animus towards her.

**C. The First Circuit's Approach To Proximate Causation Would Hinder the Enactment Of Lawful And Proper Legislation.**

The First Circuit's approach impermissibly permits courts to hinder the enactment of proper, necessary, and fiscally sound legislation. Absent a finding that a challenged municipal action is in fact improper, individual legislators and officials involved in the legislation could be held liable for their role in the enactment of perfectly legal and proper legislation. This would be particularly troubling in the context of the instant case, where the challenged legislation has been found to be not only *facially* benign, but was enacted for a benign *reason* as well. The result of a contrary rule would be to invite litigation, regardless of whether the challenged legislation was lawful, and regardless of whether it was enacted for lawful reasons. In such cases, one would pursue an action against as many individual legislators as one could, arguing that if any one of them had a "bad" motive and participated *in any way* in the legislative process (regardless of whether they attempted to persuade others of their views), their participation could be a "proximate" cause of the challenged legislation – again, without regard to how lawful the legislation itself might be.

At bottom, Bogan and Roderick respectfully submit that the First Circuit erred because it failed to recognize the impact of its holding that the City had acted lawfully in

enacting the ordinance which eliminated Scott-Harris' position. The court proceeded to apply a traditional proximate cause tort analysis to determine that the Individual Defendants were the "legal cause" of harm to Scott-Harris, without pausing to consider whether, if the City had passed a lawful ordinance by lawful means, she had suffered any ultimate legal harm.<sup>17</sup> The answer to this forgotten question must be, as a matter of law, that she had not.

**CONCLUSION**

For the foregoing reasons, the Petitioners Daniel E. Bogan and Marilyn Roderick respectfully request that this Court hold (1) that municipal and local officials are entitled to absolute immunity for actions taken in their legislative capacities; (2) that the First Circuit erred in its formulation and application of the standard of absolute immunity; and (3) that the First Circuit erred in holding that Mr. Bogan and Ms. Roderick proximately caused Scott-Harris injury when the official decision maker enacted lawful legislation for lawful reasons. Mr. Bogan and Ms. Roderick respectfully request that the Court reverse the decision of the Court of Appeals of the First Circuit and the decision of the district court below,

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<sup>17</sup> The district court, in contrast, clearly recognized the importance of a finding against the City as a necessary predicate to a finding of liability against the Individual Defendants. The district court specifically instructed the jurors that if they were to find the City not liable, then they were to go no further with their deliberations. *J.A.* at 200-201, 213; *see also id.* at 137-141. It is for this reason that the Individual Defendants did not object to the district court's subsequent instructions on causation, to the effect that the jurors were to consider causation only if they first found that the City was liable and, therefore, that Scott-Harris had suffered a legally actionable injury arising out of the legislative process.

and remand this matter to the district court for entry of judgment of dismissal.

Dated: August 14, 1997

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APPENDIX A



Massachusetts Gen. L. Ann. ch. 44, § 32

Within one hundred and twenty days after the annual organization of the city government in any city other than Boston, the mayor shall submit to the city council the annual budget which shall be a statement of the amounts recommended by him for proposed expenditures of the city for the next fiscal year. The annual budget shall be classified and designated so as to show separately with respect to each officer, department or undertaking for which an appropriation is recommended:

(1) Ordinary maintenance, which shall also include debt and interest charges matured and maturing during the next fiscal year, and shall be subdivided as follows:

(a) Salaries and wages of officers, officials and employees other than laborers or persons performing the duties of laborers; and

(b) Ordinary maintenance not included under (a); and

(2) Proposed expenditures for other than ordinary maintenance, including additional equipment the estimated cost of which exceeds one thousand dollars.

The foregoing shall not prevent any city, upon recommendation of the mayor and with the approval of the council, from adopting additional classifications and designations.

The city council may by majority vote make appropriations for the purposes recommended and may reduce or reject any amount recommended in the annual budget. It shall not increase any amount in or the total of the annual

## App. 2

budget nor add thereto any amount for a purpose not included therein except on recommendation of the mayor, and except as provided in section thirty-three; provided, however, that in the case of the school budget or in the case of a regional school district assessment, the city council, on the recommendation of the school committee or on recommendation of a regional district school committee, may be a two-thirds vote increase the total amount appropriated for the support of the schools or the regional district schools over that requested by the mayor; and provided, further, that no such increase shall be voted if it would render the total annual budget in excess of the property tax limitations set forth in section twenty-one C of chapter fifty-nine. Except as otherwise permitted by law, all amounts appropriated by the city council, as provided in this section, shall be for the purpose specified. In setting up an appropriation order or orders based on the annual budget, the council shall use, so far as possible, the same classifications required for the annual budget. If the council fails to take action with respect to any amount recommended in the annual budget, either by approving, reducing or rejecting the same, within forty-five days after the receipt of the budget, such amount shall without any action by the council become a part of the appropriations for the year, and be available for the purposes specified.

If, upon the expiration of one hundred and twenty days after the annual organization of the city government, the mayor shall not have submitted to the city council the annual budget for said year, the city council shall within thirty days upon its own initiative prepare the annual

## App. 3

budget, and such preparation shall be subject to the same requirements as the mayor's annual budget, so far as apt.

Within fifteen days after such preparation of the annual budget, the city council shall proceed to act by voting thereon and all amounts so voted shall thereupon be valid appropriations for the purposes stated therein to the same extent as though based upon a mayor's annual budget, but subject, however, to such requirements, if any, as may be imposed by law.

If the council fails to take action with respect to any amount recommended in the budget, either by approving, reducing or rejecting the same, within fifteen days after such preparation, such amount shall, without further action by the council, become a part of the appropriations for the year, and be available for the purposes specified.

Nothing in this section shall prevent the city council, acting upon the written recommendation of the mayor, from voting appropriations, not in excess of the amount so recommended, either prior or subsequent to the passage of the annual budget.

The provisions of this section shall apply, in any city adopting the Plan E form of government under chapter forty-three, only to the extent provided by section one hundred and four of said chapter.

Neither the annual budget nor appropriation orders based thereon shall be in such detail as to fix specific salaries of employees under the direction of boards elected by the people, other than the city council.



App. 4

The city council may, and upon written request of at least ten registered voters shall, give notice of a public hearing to be held on the annual budget, prior to final action thereon, but not less than seven days after publication of such notice, in a newspaper having general circulation in the city. At the time and place so advertised, or at any time or place to which such public hearing may from time to time be adjourned, the city council shall hold a public hearing on the annual budget as submitted by the mayor, at which all interested persons shall be given an opportunity to be heard for or against the proposed expenditures or any item thereof.

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Supreme Court, U. S.

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No. 96-1569

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In The  
**Supreme Court of the United States**  
October Term, 1997

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DANIEL BOGAN AND MARILYN RODERICK,  
*Petitioners,*  
versus

JANET SCOTT-HARRIS,  
*Respondent.*

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On Writ Of Certiorari  
To The United States Court Of Appeals  
For The First Circuit

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BRIEF FOR RESPONDENT

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80 pp



## TABLE OF CONTENTS

	Page
Table of Authorities .....	iv
Statement of the Facts .....	1
Summary of the Argument .....	7
Argument .....	10
I. Absolute Legislative Immunity in § 1983 Actions Should Not Be Applied at the Local Level .....	10
A. Introduction .....	10
B. Members of Local Governing Bodies Did Not Have Absolute Immunity at Common Law .....	13
C. The Immunity Available to Members of Municipal Governing Bodies in 1871 Is Comparable to the Qualified Immunity Available to State Officials in § 1983 Cases Today .....	23
D. The Public Policy Underlying § 1983 Would Be Better Served by Granting Members of Local Governing Bodies Qualified Immunity Rather than Absolute Immunity .....	25
1. This Court should not give local officials greater immunity than was afforded by the common law .....	25
2. There is no need for absolute immunity for members of local governing bodies .....	27

## TABLE OF CONTENTS — Continued

3. No workable rule can be created that would give clear guidance to local officials as to when their conduct would be administrative and when it would be legislative .....	30
4. Experience shows that absolute immunity is most frequently asserted in defense of actions affecting single individuals or businesses .....	34
5. The Possibility of Relief Against the Municipality is an Inadequate Remedy .....	35
6. Resort to the ballot box is not a viable alternative .....	36
7. Granting absolute immunity to local officials would open the door to abuse of the privilege .....	37
II. The Actions at Issue in this Case Are Not "Legislative" .....	38
III. Petitioners' Conduct Was the Proximate Cause of Plaintiff's Loss of Employment .....	42
A. Petitioners Failed to Preserve Their Appellate Rights as to Their Proximate Cause Argument .....	42
B. Since the Elimination of Plaintiff's Position Was a Foreseeable and Expected Result of the Petitioners' Conduct, That Conduct Was the Proximate Cause of Plaintiff's Injuries .....	46

## TABLE OF CONTENTS — Continued

Conclusion .....	49
Appendix A State Indemnification Statutes .....	App. 1
Appendix B Assertions of Legislative Immunity Regarding Individual Employment Decisions .....	App. 2
Appendix C Assertions of Legislative Immunity Regarding Action Taken to Discriminate on the Basis of Race .....	App. 6
Appendix D Assertions of Legislative Immunity Regarding Actions Taken to Retaliate Against Individuals For the Exercise of Free Speech Protected by the First Amendment .....	App. 8
Appendix E Assertions of Legislative Immunity Regarding Nominally General Ordinance in Fact Directed at Specific Individual or Institution .....	App. 11
Appendix F Assertions of Legislative Immunity Regarding Actions Taken for Other Invidious Purposes .....	App. 12
Appendix G Assertions of Legislative Immunity Regarding Decisions Concerning Use of One Plot of Land .....	App. 14
Appendix H Assertions of Legislative Immunity Regarding Specific Licenses Permit .....	App. 17



## TABLE OF AUTHORITIES

	Page
<b>Cases</b>	
<i>Abraham v. Peharski</i> , 728 F. 2d 167 (3rd Cir. 1984) cert. denied, 467 U.S. 1242 (1984) .....	33
<i>Adler v. Lynch</i> , 415 F. Supp 705 (D. Neb. 1976) .....	12
<i>Aitchison v. Raffiani</i> , 708 F.2d 96 (3d. Cir. 1983) .....	39
<i>Alexander v. Holden</i> , 66 F. 3d 62 (4th Cir. 1995) .....	32, 38
<i>Alexander v. Holden</i> , 66 F.3d 62,63 (4th Cir. 1995) .....	38
<i>Amy v. Supervisors</i> , 11 Wall (78 U.S.) 136 (1871) .....	passim
<i>Babbitt v. Sweet Home Chapter, Communities for a Greater Oregon</i> , 115 S. Ct. 2407 (1995) .....	47
<i>Baker v. The State</i> , 27 Ind. 485 (1867) .....	19
<i>Baker v. Mayor and City Council of Baltimore</i> , 894 F.2d 679 (4th Cir. 1990) .....	39
<i>Barr v. Mateo</i> , 360 U.S. 564 (1959) .....	12
<i>Bartlett v. Crozier</i> , 17 Johns. 439 (N.Y. 1820) .....	17
<i>Blodgett v. County of Santa Cruz</i> , 553 F. Supp. 1090 (N.D. Cal. 1981) .....	12
<i>Blue Shield of Virginia v. McCready</i> , 457 U.S. 465 (1982) ...	48
<i>Board of the County Commissioners of Bryan County, Oklahoma v. Brown</i> , 117 S. Ct. 1382, reh'g den. 117 S. Ct. 2472 (1997) .....	35
<i>Bradley v. Heath</i> , 12 Pick (29 Mass.) 164 (1831) ...	8, 19, 20, 23

## TABLE OF AUTHORITIES — Continued

<i>Brown v. Board of Education</i> , 347 U.S. 483 (1954) .....	31
<i>Browning v. Clerk, U.S. House of Representatives</i> , 789 F. 2d 923 (D.C. Cir.), cert. denied, 479 U.S. 996 (1986) .....	33
<i>Bruce v. Riddle</i> , 631 F.2d 272 (4th Cir.1980) .....	12
<i>Buckley v. Fitzsimmons</i> , 509 U.S. 259 (1993) ..	14, 25, 26, 27, 40
<i>Burns v. Reed</i> , 500 U.S. 478 (1991) .....	8, 25, 26, 29, 37
<i>Burtmik v. McLean</i> , 76 F.3d 611 (4th Cir. 1996) .....	38
<i>Butz v. Economou</i> , 438 U.S. 478 (1978) .....	9, 25, 27, 29
<i>Cameron v. Montgomery County Child Welfare Service</i> , 471 F. Supp 761 (E.D. Pa. 1979) .....	12
<i>Carlson v. Green</i> , 446 U.S. 14 (1980) .....	36
<i>Carver v. Foerster</i> , 102 F.3d 96, 98 (3d Cir. 1996) .....	38
<i>Caswell v. Allen</i> , 7 Johns. 63 (N.Y. 1810) .....	16
<i>Cinevision Corp. v. City of Burbank</i> , 745 F. 2d 560 (9th Cir. 1984), cert. denied, 471 U.S. 1054 (1985) .....	33
<i>City of Springfield v. Kibbe</i> , 480 U.S. 257 (1987) .....	45
<i>City of Newport v. Fact Concerts, Inc.</i> , 453 U.S. 247 (1981) ..	35
<i>City of Cleburne, Texas v. Cleburn Living Center</i> , 473 U.S. 432 (1985) .....	38
<i>City of Mobile v. Bolden</i> , 446 U.S. 55 (1980) .....	31

## TABLE OF AUTHORITIES — Continued

<i>Clinton v. Jones</i> , 117 S. Ct. 1636 (1997) .....	27
<i>Cobb v. City of Malden</i> , 202 F.2d 701 (1st Cir. 1953) .....	12
<i>Coffin v. Coffin</i> , 4 Mass. 1 (1808) .....	8, 19
<i>Consolidated Rail Corp. v. Gottshall</i> , 512 U.S. 532 (1994) ...	47
<i>County Commissioners of Anne Arundel County v. Duckett</i> , 20 Md. 468 (1863) .....	17, 22
<i>Crowe v. Lucas</i> , 595 F.2d 985, 989 (5th Cir. 1979) .....	12
<i>Curry v. Gillette</i> , 461 F.2d 1003 (6 <sup>th</sup> Cir.), cert. denied, 409 U.S. 1042 (1972) .....	13
<i>Cutting v. Muzzey</i> , 724 F. 2d 259 (1st Cir. 1984) .....	32, 38
<i>Davis v. Passman</i> , 442 U.S. 228 (1979) .....	42
<i>Dennis v. Sparks</i> , 449 U.S. 24 (1980) .....	14, 46
<i>Doe v. McMillan</i> , 412 U.S. 306 (1973) .....	38
<i>Douglas v. Jeannette</i> , 319 U.S. 157 (1942) .....	46
<i>Easton v. Calendar</i> , 11 Wend. 90 (N.Y. 1833) .....	19
<i>Exxon Company, U.S.A. v. Sofec, Inc.</i> , 116 S. Ct. 1813 (1996) .....	44, 48
<i>Farr v. Thompson</i> , 11 Wall (78 U.S.) (1871) .....	7, 16, 17, 23
<i>Forrester v. White</i> , 484 U.S. 219 (1988) .....	<i>passim</i>
<i>Fralin &amp; Waldron, Inc. v. County of Henrico, Va.</i> , 474 F. Supp 1315 (E.D. Va. 1979) .....	12

## TABLE OF AUTHORITIES — Continued

<i>Freeport v. Marks</i> , 59 Penn. 253 (1868) .....	17
<i>Gaffney v. Silk</i> , 488 F.2d 1248, 1250 (1st 1973) .....	13
<i>German v. Killeen</i> , 495 F. Supp 822, 830 (E.D. Mich 1980) ..	12
<i>Gravel v. United States</i> , 408 U.S. 606 (1972) .....	27
<i>Greenwood v. Corbey</i> , 26 Neb. 449 (1889) .....	20
<i>Gross v. Winter</i> , 876 F. 2d 165 (D.C. Cir. 1989) .....	33
<i>Hamilton v. Covington</i> , 445 F. Supp 195, 200 (W.D. Ark 1978) .....	12
<i>Harlow v. Fitzgerald</i> , 457 U.S. 800 (1982) .....	<i>passim</i>
<i>Haskell v. Washington Township</i> , 864 F. 2d 1266 (6th Cir. 1988) .....	12, 33
<i>Hill v. Board of Aldermen of the City of Charlotte</i> , 72 N.C. 63 (1875) .....	17
<i>Hoffman v. Harris</i> , 511 U.S. 1060 (1994) .....	25, 26
<i>Holder v. Hall</i> , 512 U.S. 874 (1994) .....	9, 31
<i>Hughes v. Tarrant County, Tex.</i> , 948 F. 2d. 918 (5th Cir. 1991) .....	32
<i>Imbler v. Pachtman</i> , 424 U.S. 409 (1976) .....	8, 25, 26, 27
<i>Jerome B. Grubart, Inc. v. Great Lakes Dredge</i> , 513 U.S. 527 (1995) .....	47
<i>Jones v. Diamond</i> , 519 F.2d 1090 (5th Cir 1975) .....	13



## TABLE OF AUTHORITIES — Continued

<i>Jones v. Loving</i> , 55 Miss. 109 (1877) .....	21, 22
<i>Ka-Haar, Inc. V. Huck</i> , 345 F. Supp 54, 56 (E.D. Wisc. 1972) .....	13
<i>Kucinich v. Forbes</i> , 432 F. Supp 1101, 1108 n 8 (N.D. Ohio 1977) .....	12
<i>Lake Country Estates, Inc. v. Tahoe Regional Planning Agency</i> , 440 U.S. 391 (1979) .....	10, 13
<i>Lane v. Inman</i> , 509 F.2d 184 (5th Cir. 1975) .....	13
<i>Lynch v. Johnson</i> , 420 F.2d 818 (6th Cir. 1970) .....	13
<i>Malley v. Briggs</i> , 475 U.S. 335 (1986) .....	<i>passim</i>
<i>Martinez v. California</i> , 444 U.S. 277 (1980) .....	47
<i>McDonnell Douglas v. Green</i> , 411 U.S. 792 (1973) .....	42
<i>McGaw v. Hamilton</i> , 184 Pa. 108 (1898) .....	20
<i>McLaughlin v. Tilendis</i> , 398 F 2d 287, 290 (7th Cir 1968) ....	13
<i>Milwaukee &amp; St. Paul R. Co. v. Kellogg</i> , 94 U.S. 469 (1877) .....	44, 47
<i>Monell v. Dept. of Social Services of the City of New York</i> , 436 U.S. 658 (1978) .....	21
<i>Morris v. The People</i> , 3 Denio 381 (N.Y. 1846) .....	16
<i>Nelson v. Knox</i> , 256 F.2d 312 (6th Cir. 1958) .....	12
<i>Nixon v. Fitzgerald</i> , 457 U.S. 731 (1982) .....	27

## TABLE OF AUTHORITIES — Continued

<i>O'Brien v. City of Greers Ferry</i> , 873 F. 2d. 1115 (8th Cir. 1989) .....	33
<i>Oberhelman v. Schultze</i> , 371 F. Supp 1089, 1090 (D. Minn 1974) .....	13
<i>Orange v. County of Suffolk</i> , 830 F. Supp.701 (E.D.N.Y. 1993) .....	39
<i>Owen v. City of Independence</i> , 445 U.S. 622 (1980) .....	<i>passim</i>
<i>Palsgraf v. Long Island R. Co.</i> , 248 N.Y. 339 (1928) .....	47
<i>Parine v. Levine</i> , 274 F. Supp 268, 269 (E.D. Mich 1967) ....	13
<i>Pierson v. Ray</i> , 386 U.S. 547 (1967) .....	24, 25
<i>Progress Developement Corp v. Mitchell</i> , 286 F 2d 222, 231 (7th Cir 1961) .....	13
<i>Pulliam v. Allen</i> , 466 U.S. 522 (1984) .....	14
<i>Rateree v. Rockett</i> , 630 F.Supp 763 (N.D. Ill 1986) .....	39
<i>Richardson v. McKnight</i> , 117 S. Ct. 2100 (1997) .....	14
<i>Roberson v. Mullins</i> , 29 F.3d 132 (4 <sup>th</sup> Cir. 1994) .....	33
<i>Ryan v. Burlington County</i> , 889 F. 2d 1286 (3rd Cir. 1989) ...	32
<i>Scheuer v. Rhodes</i> , 416 U.S. 232 (1974) .....	25, 26
<i>Smith v. Wade</i> , 461 U.S. 30 (1981) .....	13
<i>Smith v. Lomax</i> , 45 F. 3d 402 (11th Cir. 1995) .....	33
<i>Smith v. Higgins</i> , 16 Gray (82 Mass.) 251 (1860) .....	20

## TABLE OF AUTHORITIES — Continued

<i>Spallone v. United States</i> , 493 U.S. 265 (1990) .....	10, 19, 32
<i>Supreme Court of Virginia v. Consumers Union of the United States</i> , 446 U.S. 719 (1980) .....	9, 34, 39
<i>Tenney v. Brandhove</i> , 341 U.S. 367 (1951) .....	<i>passim</i>
<i>Thomas v. Younglove</i> , 545 F.2d 1171 (9 <sup>th</sup> Cir. 1976) .....	12
<i>Tower v. Glover</i> , 467 U.S. 914 (1984) .....	25
<i>United States Department of Agriculture v. Moreno</i> , 413 U.S. 528 (1973) .....	38
<i>Vail v. Owen</i> , 19 Barb. 22 (N.Y. 1854) .....	19
<i>Wall v. Trumbull</i> , 16 Mich. 228 (1867) .....	17
<i>Washington v. Davis</i> , 426 U.S. 229 (1976) .....	21, 42
<i>Wasson v. Mitchell</i> , 18 Iowa 153 (1864) .....	17
<i>West Side Women's Services v. City of Cleveland</i> , 573 F. Supp 504, 524 (N.D. Ohio 1983) .....	12
<i>Wilson v. the Mayor and City of New York</i> , 1 Denio 595 (N.Y. 1845) .....	17
<i>Wood v. Strickland</i> , 420 U.S. 308 (1975) .....	9, 10, 11, 13, 29
<i>Wyatt v. Cole</i> , 504 U.S. 158 (1992) .....	14, 24

## TABLE OF AUTHORITIES — Continued

## Statutes and Rules

18 U.S.C. § 1983 .....	<i>passim</i>
Federal Rules of Civil Procedure, Rule 51 .....	45
Mass. G.L. c. 43 § 54 .....	9, 39

## Treatises, Law Review Articles and Other Sources

1992 Census of Governments, Volume I, <u>Government Organization</u> , Number 2, Popularly Elected Officials, U.S. Department of Commerce, Bureau of the Census, June 1995 .....	4, 11, 31
Board of Education, City of New York, New York Educational Network (1997) .....	11
T. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT 377 (1880) .....	18
A. CORBIN, CORBIN ON CONTRACTS §998 (1964) .....	44
K. DAVIS, ADMINISTRATIVE LAW TREATISE (SUPP. 1970) ....	32
J. DILLON, TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS §176, §753 (2D ED. 1872) .....	18, 22
HARPER ON TORTS §248 (1933) .....	20
W. PROSSER, HANDBOOK ON THE LAW OF TORTS (1941) ....	20
W. PAGE KEETON ET. AL., PROSSER AND KEETON ON THE LAW OF TORTS (5th ed. 1984) .....	20, 44



## TABLE OF AUTHORITIES — Continued

Massachusetts Department of Revenue, Division of Local Services, At a Glance Reports (1997) .....	11
F. MECHAM, A TREATISE ON THE LAW OF PUBLIC OFFICES AND OFFICERS §647 (1890) .....	18, 21
Restatement (Third) of Torts §590 (1997) .....	20
Restatement (Second) of Torts § 442, 443 (1965) .....	48

## STATEMENT OF THE FACTS

Janet Scott-Harris was hired by the City of Fall River, Massachusetts in 1987 to be the city's first administrator of the newly created Department of Health and Human Services. Scott-Harris was the first African-American ever to work for the city in an administrative position.<sup>1</sup> See Tr. Trans. 5:14.

Scott-Harris encountered racial hostility from two people at city hall: the petitioner Marilyn Roderick, who was a long-time city council member,<sup>2</sup> and Dorothy Biltcliffe, a well-connected city employee who eventually came under Scott-Harris' direct supervision. Both are white. Problems with Roderick began early in Scott-Harris' tenure when the two were interviewing candidates for a new position. Roderick made references to an African-American candidate's race and about black people. Scott-Harris took offense at these comments and the two women got into a heated argument, in which Scott-Harris said Roderick's remarks were racist. *Id.* 2:39-42. Scott-Harris later called Roderick to try to make amends but Roderick hung up on her. *Id.* 2:48. After that confrontation their relationship was bitter and conflicting. *Id.*

Dorothy Biltcliffe was director of the Council on Aging Nutrition Program. In July 1990 Biltcliffe began to report directly to Scott-Harris. Biltcliffe refused to take directions from Scott-Harris. Other employees complained that Biltcliffe yelled at them and threatened them, often making racial remarks. *Id.* 2:56-57. Speaking to other city employees, she referred to Scott-Harris as the "black nigger bitch," *Id.* 2:60, and to another nutrition program employee as a "little black bitch." *Id.* 2:43.

Biltcliffe's conduct came to a head in October 1990 when she flew into a rage at a meeting and called a subordinate a "bitch with her head stuck up [Scott-Harris'] ass." *Id.* 43. She said she was

<sup>1</sup> Fall River has a population of 92,703 of whom 952 are African-American. United States Census, 1990, Database C90STF1A.

<sup>2</sup> The defendant Marilyn Roderick had been "in city government" in Fall River for 20 years. See Tr. Trans. 5:53. At the time of trial she had been on the city council for 18 years. *Id.* 5:6. She was chairman of the council's ordinance committee for nine years, vice chairman and then president of the city council in 1991. *Id.* 2:36.

not going to take this treatment and would "go to the sixth floor"<sup>3</sup> and get anything [she] wanted." Scott-Harris heard of this and interviewed a dozen or so employees, uncovering more racist statements. One minority employee complained that Biltcliffe called her a "black bitch" and said she was going to get rid of her. Biltcliffe referred to Scott-Harris as a "black nigger." *See* Trial Ex. 6. Another employee complained of "vulgarity, profanity as well as racial and ethnic slurs" by Biltcliffe. *See* Trial Ex. 7. Another minority employee told Scott-Harris that Biltcliffe had yelled at her that it is "just like you niggers" to stick together against her. *See* Tr. Trans. 2:61-65.

Scott-Harris asked for an assistant corporation counsel to help draw up charges against Biltcliffe, the standard procedure in such matters. Assistant Corporation Counsel Paul Desmarais, however, told Scott-Harris that he wouldn't "touch a case with Dorothy Biltcliffe, she has been around a long time and she was really tough." Desmarais said he would talk with Bruce Assad, corporation counsel, and that they would see if they could find some one to help Scott-Harris. Initially, however, no attorney was appointed and Scott-Harris was forced to draw up the charges against Biltcliffe by herself. *Id.* 2:68-69.

Scott-Harris gave the charges to Biltcliffe. *See* Trial Ex. 8. Biltcliffe responded by calling Scott-Harris "nothing but a black nigger bitch" and said Scott-Harris would not get away with this, that she "knew people," that she knew things and that Scott-Harris was "going to be sorry." *See* Tr. Trans. 2:72-2:73. Within four months Scott-Harris' job had been "eliminated." *Id.* 2:123-124. Biltcliffe went on medical leave immediately after being informed of the charges against her, to return with a new, make-work position after Scott-Harris lost her job. Her physician, who recommended the medical leave, was the chairman of the city's Board of Health. *Id.* 2:85-2:86.

<sup>3</sup> The mayor's office was on the sixth floor of City Hall. *See* Tr. Trans. 2:48.

Biltcliffe asked several politicians to help her with the discrimination charges. She contacted Councilwoman Roderick<sup>4</sup> and asked her for help. Roderick told Biltcliffe that Scott-Harris had called her a racist, too. Roderick spoke with City Manager Robert Connors on Biltcliffe's behalf. *See* Trial Trans. 5:29-33. Biltcliffe asked another city council member, Raymond Mitchell, for help. Roderick and Mitchell are "very close friends" and they discussed Biltcliffe's problem. *Id.* 5:50. Biltcliffe also called a local state senator for help. He summoned Scott-Harris to his office, asked her to help Biltcliffe and warned that City Manager Connors "will do what I tell him to do."<sup>5</sup> *Id.* 2:82.

Shortly after bringing charges against Biltcliffe, Scott-Harris began hearing rumors that her position "was going to take a political hit." Then on February 12, 1991, Connors told Scott-Harris that her position was indeed being eliminated, allegedly for financial reasons. *Id.* 2:123-124. Shortly after that Mayor Bogan submitted an ordinance to the City Council that would eliminate the Department of Health and Human Services. The only financial effect of that ordinance was the elimination of Scott-Harris' job. *Id.* 5:39. Mayor Bogan wrote to the city clerk on March 18, 1991 eliminating Scott-Harris' position effective March 29, even though the city council had not acted on his recommendation. *See* Trial Ex. 29. The city council's ordinance committee, chaired by Roderick, approved elimination of Scott-Harris' position and Roderick sent the ordinance

<sup>4</sup> Roderick had helped Biltcliffe in the past with Scott-Harris. When salary increases were proposed for some employees in the elderly nutrition program, the matter was to be heard by the city council's ordinance committee, chaired by Roderick. Roderick ordered Scott-Harris, who had just had foot surgery and was on crutches, to attend the meeting. At that meeting, which was broadcast on local cable television, Roderick yelled and pointed her finger at Scott-Harris, asking why Dorothy Biltcliffe wasn't getting a raise. "She told me to read her lips. She [said she] didn't hire me to do what I thought should be good for the department, that there were other people above me that told me what I should do for the department. She just yelled and yelled and she pointed," Scott-Harris said. *Id.* 2:50.

At several other public meetings Roderick spoke to Scott-Harris in a tone of voice that was "just ugly," a tone of voice she did not use in speaking to other city managers. *Id.* 2:52-53.

<sup>5</sup> This state senator later interceded with Bogan on Biltcliffe's behalf to have her punishment reduced. *See* Trial Ex. 75, *see also* Tr. Trans. 7:76.



to the full council. *See* Trial Ex. 30. Shortly before the council voted, a councilor friendly to Scott-Harris called her and asked why "they were trying to get rid of" her. *See* Tr. Trans. 4:49-4:50. The city council voted 6-2 to eliminate her position. The only new position added by the City of Fall River 1992 budget was a new second administrative assistant in the Council on Aging, a position filled by Dorothy Biltcliffe. *Id.* 6:73-74.

Marilyn Roderick, Daniel Bogan and witnesses for the City of Fall River all said the one and only reason for the elimination of Scott-Harris' position was to save the city money. *See* Tr. Trans. 5:40,<sup>6</sup> 5:51 (C.A. at 774), 6:80. They all testified her job performance had nothing to do with the decision to eliminate her position. *Id.* 5:40 (C.A. at 682), 5:51 (C.A. at 774), 6:80. In fact, they said, her job performance had been excellent. *Id.* 5:14-5:15, 6:81. The respondent offered substantial evidence demonstrating that their financial justification was pretextual:

**Bogan was not really anticipating a cut in state aid —** Daniel Bogan assumed the position of mayor in December 1990.<sup>7</sup> *See* Tr. Trans. 6:77. In January of 1991 he claimed he received a "flyer" indicating there could be a ten percent cut in state funding. *Id.* 5:39 and 6:84. Because of that anticipated cut, he testified, he decided to trim city spending, including eliminating Scott-Harris' position. *See* Trial Ex. 29. At the same time that Bogan proposed to eliminate Scott-Harris' position because he claimed he anticipated a reduction in state funding, Bogan submitted his annual budget proposal, *see* Trial Ex. 40, to the City Council. In that proposal he anticipated an increase in state funding.<sup>8</sup>

<sup>6</sup> Due to a typographical error, a portion of the transcript of the fifth trial day contains duplicates. The passage cited above can be found at page 682 of the Court of Appeals Consolidated Appendix (hereafter "C.A.").

<sup>7</sup> Bogan had been a City Council member for twenty years and president for fourteen years. *See* Tr. Trans. 6:77.

<sup>8</sup> In Mayor Bogan's introduction to that 1992 budget, *see* Trial Ex. 40, Bogan said the budget was prepared assuming "\$62,802,604 from State Aid (Cherry Sheet)." *Id.* The prior year's budget, *see* Trial Ex. 39, states it was prepared based on "\$61,623,177 from State Aid (Cherry Sheet)." *Id.* The jury thus could have concluded that rather than anticipating a decrease in state aid from fiscal year 1991 to 1992, Bogan prepared his budget assuming an increase in state aid.

**Firing Scott-Harris actually cost the city money —** For the last year or so prior to her termination, the positions of the three department heads Scott-Harris supervised — Veterans Affairs, Public Health and the Council on Aging — were all vacant.<sup>9</sup> While those positions were vacant Scott-Harris performed all the day to day duties of each of those positions. *See* Tr. Trans. 2:114-166, 4:31, 6:83. Mayor Bogan had no complaints about the way Scott-Harris was performing her job or the three vacant jobs. *Id.* 6:83. Even though Scott-Harris had been performing those jobs for more than a year with no problems, all three positions were funded in the fiscal year 1992 budget and were filled shortly after Scott-Harris left. The city saved \$46,305 by eliminating Scott-Harris' position. *See* Trial Ex. 39A. The city then spent \$105,205 to hire replacements for the three vacant positions whose jobs Scott-Harris had been performing for more than a year with no problems or complaints.<sup>10</sup>

**Bogan did not consider other options for saving money —** Department heads, including Scott-Harris, were told to prepare reduced budgets in case there was a decrease in state funding. Scott-Harris submitted budget proposals, *See* Tr. Trans. 5:42-43, which recommended not filling 50 to 60 vacant positions and changing the work days of school nurses so that they only worked when school was in session, rather than year round. *Id.* 2:121. Those proposals would have trimmed at least 10 percent of her department's budget.<sup>11</sup> *Id.* 2:122, 5:43.

Instead, Bogan decided to eliminate Scott-Harris' job. He conceded that when he sent the City Council his proposed ordinance eliminating Scott-Harris' position he had not looked at or even considered her own budget proposals for her department and was

<sup>9</sup> As of Scott-Harris' last day with the city the director of the Council on Aging position had been vacant for nine months. *See* Tr. Trans. 2:55. The head of the Veterans Affairs Department position had been vacant for seventeen months. *Id.* 2:116. The director of Public Health died in September 1989 and his position had remained vacant for eighteen months. *Id.* 2:114.

<sup>10</sup> *See* Trial Ex. 40A at 1497 (Health), 1505 (Veterans), 1515 (Council on Aging) of the consolidated appendix.

<sup>11</sup> City Manager Connors, too, gave Bogan a budget cutting proposal "that would have satisfied the [anticipated] reduction" without removing Scott-Harris. Bogan rejected that proposal. *See* Trial Trans. 5-44, C.A. at 767.

unaware that her proposal to pay school nurses only when schools were in session alone would have saved the city more money than was saved by eliminating her position. *Id.* 6:90-91.

Mayor Bogan could have saved Scott-Harris' salary in several different ways without resort to an ordinance abolishing her position. He could have acted on his own under statutory authority under Mass. G.L. c. 43 § 54, *see* Tr. Trans. 6:67, Trial Ex. 85, and simply removed Scott-Harris from her position. He could have left the position vacant but unfunded.<sup>12</sup> *See* Tr. Trans. 6:69. Petitioners concede that had Bogan chosen these options he would not be entitled to assert a defense of legislative immunity. Pet. Br. at 38-39. His other option was to recommend to the City Council that the Department of Health and Human Services be eliminated and that Scott-Harris be replaced by hiring people to fill the three vacant positions for which she was responsible. Each of these options would have saved the city the cost of her salary. *Id.* 6:69. Bogan chose to go to the city council. *See* Tr. Trans. 6:80.

**Bogan's conduct after eliminating her job showed his animus against Scott-Harris** — Bogan's desire to remove Scott-Harris from city government was demonstrated by his actions after he eliminated her job. He offered her the public health director position at a \$10,000 cut in pay. *See* Trial Ex. 14. When Scott-Harris accepted, *see* Trial Ex. 17, however, Mayor Bogan added new, problematic duties to the position and relocated her office to an undesirable location. *See* Tr. Trans. 2:130. Scott-Harris prepared a rejection letter, but changed her mind. She retrieved and destroyed what she believed were all the copies of the letter. She sent a new letter to Mayor Bogan accepting the position. *Id.* 2:134-135, 3.3-3.6, Trial Ex. 20. Bogan had his secretary retrieve a torn up copy of the rejection letter from a waste basket, *see* Tr. Trans. at 6:16, 7:66, and then wrote to Scott-Harris acknowledging her rejection of his offer. *See* Trial Ex. 23.

<sup>12</sup> For example, the positions of directors of public health, veterans affairs and the council on aging had all been left vacant to save money. All three positions had been created by ordinance, just as Scott-Harris' had been. *See* Tr. Trans. 5:47. City Council action had not been needed to leave those ordinance-created positions vacant.

The central issue at trial was whether the defendants eliminated Scott-Harris' position to retaliate against her for objecting to Biltcliffe's racism or to save money. Daniel Bogan testified he had "no reason, other than pure economics, saving money," for his recommendation that respondent's job be eliminated. *Id.* 6:80. Marilyn Roderick testified her "one and only reason for eliminating" Scott-Harris' position "was because it was expected there was going to be a shortage of money." *Id.* 5:40.

The jury clearly did not believe this testimony. The jury found that Scott-Harris proved the reason given by the defendants for elimination of her position was not the true reason (Question 1), that Scott-Harris' "constitutionally protected speech was a substantial or motivating factor" in the decision to eliminate her position (Questions 2, 6 and 9), and that Roderick's vote (Question 7) and Bogan's recommendation (Question 10) proximately caused the elimination of her position.

#### SUMMARY OF THE ARGUMENT

**I.** Absolute legislative immunity in § 1983 actions should not be extended to the local level. The existence of an analogous common law immunity in 1871 is a necessary first step to a finding that Congress intended that a particular group of officials would be immune from § 1983 liability. The best evidence of the state of the common law comes from this Court itself. Just one month before the 1871 Civil Rights Act was passed by Congress this Court upheld two monetary claims against members of local governing bodies for their legislative actions. In *Amy v. The Supervisors*, 11 Wall. (78 U.S.) 136 (1871), this Court upheld a damage award against the supervisors of Des Moines County, Iowa personally for refusing to obey a court order that they levy a tax to pay a judgment. This Court said, "There is a common law liability. . . . The rule is well settled that where the law requires absolutely a ministerial act to be done by a public officer, and he neglects or refuses to do such act, he may be compelled to respond in damages to the extent of the injury arising from his conduct. There is an unbroken current of authorities to this effect." 11 Wall at 138. In a companion case, *Farr v. Thompson*, 11 Wall. (78 U.S.) 139 (1871) this Court held that members of the



Racine City Council could be sued for damages personally for failing to raise taxes to pay a judgment.

These decisions followed a well established line of nineteenth century common law decisions holding local legislators personally liable for "ministerial" acts in their legislative capacity. "Ministerial" acts included conduct that would be considered clearly legislative conduct today if done by Congress or a state legislature. Such conduct was termed "ministerial" only because the legislative body had no discretion.

In 1871 different immunity rules applied to legislators at the local level than at the state level. Even though members of state legislatures were absolutely immune from liability even when they acted maliciously, members of municipal governing bodies could be held personally liable for their tortious conduct when they used their official powers maliciously or in bad faith. For example, in *Bradley v. Heath*, 12 Pick. 164 (Mass. 1831), the Massachusetts Supreme Judicial Court held that a slander action could be maintained against a member of the Town of Brookline Board of Selectmen if he acted with malice. That decision was by the same state court that earlier had held, also in a slander action, that a state legislator was absolutely immune from liability. *Coffin v. Coffin*, 4 Mass. 1 (1808). This limited good faith immunity the common law granted members of local governing bodies is the equivalent of present day qualified immunity.

The absence of absolute immunity prior to 1871 has been regarded by this Court as dispositive where the position in question, like the level of immunity accorded to such individuals, "was known to American common law." *Burns v. Reed*, 500 U.S. 478, 493 (Emphasis in original).

Even if this Court examines policy reasons for granting immunity, the Court should find that the policies behind § 1983 are best served by qualified immunity at the local level. Qualified immunity is the norm for state officials because "to extend absolute immunity to any group of state officials is to negate *pro tanto* the very remedy which it appears Congress sought to create." *Imbler v. Pachtman*, 424 U.S. at 434 (White, J., concurring). Petitioners suggest several policy reasons for absolute immunity but this Court

has already determined that qualified immunity is sufficient to meet each of those concerns. *Butz v. Economou*, 438 U.S. 478, 506 (1978)(skewed official decisions), *Wood v. Strickland*, 420 U.S. 308 (1975)(skewed official decisions, deterrence from government service); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982)(time and effort of litigation).

Further, no workable rule can be created that would give clear guidance to local officials as to when their conduct would be deemed administrative and when it would be legislative. Local governments range from New England town meetings, where the legislature is as large as the adult population, to some Southern counties that grant the totality of legislative and executive power to a single county commissioner. See *Holder v. Hall*, 512 U.S. 874 (1994). In contrast to the conscious separation of powers in the state and federal governments, most local governments have gone to great pains to merge executive and legislative functions. Efforts by the lower courts to create formulae to distinguish "legislative" acts from "administrative" ones have created a smorgasbord of theories and results.

Experience shows that absolute immunity is most frequently asserted in defense of actions affecting single individuals or businesses. In a vast majority of the reported cases, as here, the litigation concerned actions which arose out of a single controversy, affected only a handful of particular individuals, and involved no rule of general application.

Absolute immunity would embolden local legislators who well know their conduct could violate constitutional rights to proceed nonetheless, thus defeating of the deterrence policy underlying § 1983. "Where an official could be expected to know that his conduct would violate statutory or constitutional rights, he should be made to hesitate. . ." *Harlow v. Fitzgerald*, 457 U.S. at 819.

II. Petitioners' conduct fails to meet this Court's definition of "legislative" for immunity purposes. In *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 731 (1980), this Court held that the regulations at issue were "legislative" because they were "rules of general application . . . [that] act not on [particular] parties . . ." The

ordinance abolishing respondent's job can hardly be characterized as "a rule of general application" since its only impact was to eliminate the respondent's job. The mayor admitted he could have achieved the same result by simply firing respondent and not hiring a replacement. As such, eliminating the respondent's position was not a "legislative" act.

**III.** Petitioners failed to preserve any objection to the sufficiency of the evidence regarding proximate cause. Neither party filed a motion for a directed verdict or for judgment n.o.v. on the same proximate cause ground now advanced in this Court.

Petitioners' conduct was the proximate cause of plaintiff's loss of employment. Applying general tort principles of causation, since the elimination of plaintiff's position was a foreseeable and expected and intended result of the petitioners' conduct, that conduct was the proximate cause of plaintiff's injuries.

## ARGUMENT

### I. ABSOLUTE LEGISLATIVE IMMUNITY IN § 1983 ACTIONS SHOULD NOT BE APPLIED AT THE LOCAL LEVEL.

#### A. Introduction.

The threshold question presented by this case is whether in civil rights actions under 42 U.S.C. § 1983 members of local governing bodies should be accorded absolute immunity for their "legislative" actions. This Court expressly reserved that issue in *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 404, n. 26 (1979) and *Spallone v. United States*, 493 U.S. 265, 278 (1990).

The Court does not write on a blank slate concerning municipal legislative bodies. In *Wood v. Strickland*, 420 U.S. 308 (1975), this Court recognized that "school board members function at different times in the nature of legislators and adjudicators," 420 U.S. at 319, and that "[t]he overwhelming majority of school board members are elected to office." 420 U.S. at 320, n. 11. Despite their legislative function as elected public officials, this Court found that

school board members were entitled to a qualified immunity in § 1983 actions, but not to absolute immunity. 420 U.S. at 315-320.

Petitioners have not asked this Court to overrule *Wood v. Strickland*. The issue thus is whether a different form of immunity is necessary for members of municipal governing bodies than was found proper and sufficient for elected members of school boards. Some school boards, of course, have far greater responsibilities than many towns. The New York City Board of Education, for example, has an annual budget of \$8.84 billion and provides educations for 1,075,605 students, ten times Fall River's population.<sup>13</sup> The City of Fall River, with a 1991-1992 annual budget at issue in the present case of \$111,347,548, see Trial Ex. 40, is dwarfed by the New York City Board of Education. Petitioners seek absolute immunity for members of all municipal governing boards, which would include, as an example, the Board of Selectmen of the town of Hubbardston, Massachusetts, which has a municipal budget of \$3,494,606 for its 3,364 residents.<sup>14</sup>

Petitioners seek a vast expansion of immunity from the nation's civil rights laws. Some 96 percent of the nation's elected officials are officials of local governments. There are 535 members of Congress protected by the Speech or Debate clause of the Constitution. There are approximately 7,461 state legislators within the scope of *Tenney v. Brandhove*, 341 U.S. 367 (1951). If absolute immunity is granted to members of city and county governing bodies, some 342,812 additional persons will be able to engage in knowing and deliberate violations of the federal constitution free from any liability.<sup>15</sup>

<sup>13</sup> Board of Education, City of New York, New York Educational Network (1997).

<sup>14</sup> Massachusetts Department of Revenue, Division of Local Services, At A Glance Reports (1997).

<sup>15</sup> 1992 Census of Governments, Volume I, Government Organization, Number 2, Popularly Elected Officials, U.S. Dept. of Commerce, Bureau of the Census, June 1995 (hereafter "1992 Census"), p. 1, Table 1 Elected Officials of State and Local Governments by Region and Type of Government: 1992. The figures are for elected members of governing boards, which the Census Bureau defined as "the principle policymaking body for a government" *id.* p. x, and includes Congress at the federal level and state legislatures at the state level. Appendix B, p. B-1.



At least until the early 1980's the prevailing view in the lower federal courts was that absolute legislative immunity did not extend to the local level and that local officials were protected by no more than qualified immunity. A leading case so holding was authored by Judge Potter Stewart, *Nelson v Knox*, 256 F.2d 312, 314 (6<sup>th</sup> Cir. 1958), in which the court said, "In the light of the relevant federal decisions, we cannot agree that members of a municipal legislative body share the complete immunity from liability which is enjoyed by judges and state legislators." The decision in *Nelson* remained the controlling precedent in the Sixth Circuit until just nine years ago.<sup>16</sup> Other federal courts also held that absolute legislative immunity was not available to local government officials.<sup>17</sup> Some

<sup>16</sup> See *Haskell v. Washington Twp.*, 864 F.2d 1266 (6<sup>th</sup> Cir. 1988).

<sup>17</sup> For example, in *Cobb v City of Malden*, 202 F.2d 701(1<sup>st</sup> Cir. 1953), Chief Judge Magruder, concurring, said:

[T]he defendant members of the city council were exercising legislative functions, on a subordinate level. But it seems that, as respects members of similar subordinate legislative bodies, there has not been such a general and unquestioned recognition at the common law of an absolute immunity from civil liability for acts done by such persons in their official capacity, comparable to the complete immunity accorded to members of state legislatures.

See also, *Barr v. Mateo*, 360 U.S. 564, 579 (1959) (Warren, J., dissenting)("However, this [absolute legislative] immunity has not been extended to inferior deliberative bodies"); *Bruce v. Riddle*, 631 F.2d 272, 276 and n. 4 (4<sup>th</sup> Cir. 1980)("There is little, if any, early American precedent indicating that such early immunity extended to individuals exercising legislative functions in political subdivisions of the lower echelon. The early American cases . . . were concerned for the most part with types of qualified immunity. . . ."); *Thomas v. Younglove*, 545 F.2d 1171 (9<sup>th</sup> Cir. 1976)(*Tenney* applies to state legislators but "not necessarily to those other state or local officials whose duties can be characterized as partially legislative"); see also *West Side Women's Services v. City of Cleveland*, 573 F. Supp 504, 524 (N.D. Ohio 1983); *Blodgett v. County of Santa Cruz*, 553 F. Supp. 1090 (N.D. Cal. 1981); *German v. Killeen*, 495 F. Supp 822, 830 (E.D. Mich 1980); *Fralin & Waldron, Inc. v. County of Henrico, Va.* 474 F. Supp 1315 (E.D. Va. 1979); *Crowe v. Lucas*, 595 F 2d 985, 989 (5th Cir 1979); *Cameron v. Montgomery County Child Welfare Service*, 471 F. Supp 761 (E.D. Pa. 1979); *Hamilton v. Covington*, 445 F. Supp 195, 200 (W.D. Ark 1978); *Kucinich v. Forbes*, 432 F. Supp 1101, 1108 n 8 (N.D. Ohio 1977); *Adler v. Lynch*, 415 F. Supp 705 (D. Neb. 1976); *Jones v. Diamond*, 519 F 2d 1090 (5th Cir 1975); *Lane v. Inman*, 509 F.2d 184 (5<sup>th</sup> Cir. 1975); *Oberhelman v. Schultze*, 371 F. Supp 1089, 1090 (D. Minn 1974);

courts relied on *Wood v. Strickland* to hold that local officials have qualified immunity.<sup>18</sup> Within the last fifteen years, however, the lower federal courts have largely changed their view, primarily after this Court's decision in *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391. See Pet. Br. 21. None of these more recent federal court decision was based on any historical analysis of common law immunity for municipal legislators as of 1871, which this Court says is a necessary first step to a finding of absolute immunity.

#### B. Members of Local Governing Bodies Did Not Have Absolute Immunity at Common Law.

This Court's analysis of whether a state official is immune from § 1983 liability and, if so, the scope of that immunity, begins with an examination of the common law in 1871, as the members of the 42<sup>nd</sup> Congress would have understood it.<sup>19</sup>

The principles applied to determine the scope of immunity for state officials sued under . . . 42 U.S.C. Section 1983 are by now familiar. Section 1983, on its face, admits of no defense of official immunity. It subjects to liability "[e]very person" who, acting under color of state law, commits the prohibited acts. In *Tenney v. Brandhove*, 341 U.S.

*Gaffney v. Silk*, 488 F 2d 1248, 1250 (1st Cir.1973); *Ka-Haar, Inc. v. Huck*, 345 F. Supp 54, 56 (E.D. Wisc. 1972); *Curry v. Gillette*, 461 F.2d 1003 (6<sup>th</sup> Cir.), cert. denied, 409 U.S. 1042 (1972); *Lynch v. Johnson*, 420 F. 2d 818, 821-22 (6th Cir 1970); *McLaughlin v. Tilendis*, 398 F 2d 287, 290 (7th Cir 1968); *Parine v. Levine*, 274 F. Supp 268, 269 (E.D. Mich 1967); *Progress Developement Corp v. Mitchell*, 286 F 2d 222, 231 (7th Cir 1961).

<sup>18</sup> A number of lower court decisions have relied on *Wood* in holding that absolute legislative immunity is unavailable to city and county councils. *Adler v. Lynch*, 415 F.Supp 705, 712 (D. Neb. 1976); *Altaire Builders v. Village of Horseheads*, 551 F.Supp 1090, 1105 (N.D. Cal 1981); *Cameron v. Montgomery County Child Welfare Service*, 471 F.Supp 761, 764 (E.D. Pa. 1979).

<sup>19</sup> "The reason our earlier decisions interpreting § 1983 have relied upon common law decisions is simple: members of the 42nd Congress were lawyers, familiar with the law of their time. In resolving ambiguities in the enactments of that Congress, as with other Congresses, it is useful to consider the legal principles and rules that shaped the thinking of its members." *Smith v Wade*, 461 U.S. 30, 66 (1981) (Rehnquist, J. dissenting).

367, 376 (1951), however, we held that Congress did not intend Section 1983 to abrogate immunities "well grounded in history and reason." Certain immunities were so well established in 1871, when Section 1983 was enacted, that "we presume that Congress would have specifically so provided had it wished to abolish" them.

*Buckley v. Fitzsimmons*, 509 U.S. 259, 267-68 (1993).

Time and again this Court has affirmed that the existence of an analogous common law immunity in 1871 is a necessary first step to a finding that state officials are immune from § 1983 liability. "If parties seeking immunity were shielded from tort liability when Congress enacted the Civil Rights Act of 1871 -- § 1 of which is codified at 42 U.S.C. § 1983 -- we infer from legislative silence that Congress did not intend to abrogate such immunities when it imposed liability for actions taken under color of state law." *Wyatt v. Cole*, 504 U.S. 158, 164 (1992).<sup>20</sup> Most recently, in *Richardson v. McKnight*, 117 S.Ct. 2100 (1997), in which this Court held that private prison guards do not have qualified immunity, the Court noted that both the concurring and the dissenting justices in *Wyatt v. Cole*, 504 U.S. 158, agreed that the common law history is the source of any immunity under § 1983.

Petitioners expressly invoke this historical approach. They urge that in 1871 the immunity of local legislative officials from civil liability was, like the immunities of state judges and state legislators, well established.

<sup>20</sup> See also, *Malley v. Briggs*, 475 U.S. 335, 342 (1986) ("We reemphasize that our role is to interpret the intent of Congress in enacting § 1983, not to make a freewheeling policy choice, and that we are guided in interpreting Congress' intent by the common law tradition."); *Pulliam v. Allen*, 466 U.S. 522, 529 (1984) ("The starting point in our own analysis is the common law. Our cases have proceeded on the assumption that common law principles of legislative and judicial immunity were incorporated into our judicial system, and that they should not be abrogated absent clear legislative intent to do so. Accordingly, the first and crucial question is whether the common law recognized judicial immunity from prospective collateral relief"). *Dennis v. Sparks*, 449 U.S. 24, 29 (1980) ("The immunities of state officials that we have recognized for purposes of § 1983 are the equivalents of those that were recognized at common law . . .").

[T]he principle of absolute immunity . . . was never limited to particular levels of our government, whether federal, state, regional or municipal. . . . Nor is there anything to suggest that, by the time Congress enacted § 1983 in 1871, municipal legislators had come to be viewed as *sui generis* and, therefore, not entitled to the same absolute immunity enjoyed by legislators at other levels of government.

(Pet. Br. 23). Indeed, petitioners suggest, absolute legislative immunity at the city and county level was so well established in 1871 that "[n]o reported case can be found in which . . . the officers of a municipal corporation . . . were sued for legislative acts, whether they were unconstitutional, oppressive, malicious, or corrupt." Pet. Br. 24, n. 10.

The historical record is otherwise. The starkest proof that members of the 1871 Congress would have known that the common law did not recognize absolute immunity at the local level is that in March 1871, less than a month before the enactment of the 1871 Klu Klux Klan Act, this Court upheld two damage claims against local legislators. In *Amy v. The Supervisors*, 11 Wall. (78 U.S.) 136 (1871), this Court upheld a judgment of \$12,108.03 against the supervisors of Des Moines County, Iowa personally. The plaintiff had earlier secured a judgment against the county on certain county notes, and then an order directing the supervisors to levy a tax sufficient to pay that first judgment. When they failed to do so, the plaintiff brought a new action against the supervisors personally for the amount of the prior judgment plus damages occasioned by their failure to levy the tax needed to pay that judgment. This Court rejected arguments that the individual supervisors could not be held personally liable, ruling that the supervisors' official conduct had violated a clear legal obligation:

There is a common law liability. . . . The rule is well settled that where the law requires absolutely a ministerial act to be done by a public officer, and he neglects or refuses to do such act, he may be compelled to respond in damages to the extent of the injury arising from his conduct. There is an



unbroken current of authorities to this effect. A mistake as to his duty and honest intentions will not excuse the offender.

11 Wall at 138.<sup>21</sup> In a companion case, decided the same day as *Amy*, this Court held the members of the Racine City Council could be sued for damages for failing to raise taxes to pay a judgment. *Farr v. Thompson*, 11 Wall. (78 U.S.) 139 (1871).<sup>22</sup> In summarily finding the members of the city council personally liable for their failure to vote to raise taxes, this Court simply stated, "The proper solution of the question submitted is too clear to admit of doubt or require discussion." 20 L.Ed. 102.

This Court's decisions in *Amy* and *Farr* followed a well established line of common law decisions holding local legislators personally liable. For example, in *Morris v. The People*, 3 Denio 381 (N.Y. 1846), New York's highest court affirmed a judgment of \$250 personally against the mayor of New York, in his capacity as a member of the city's board of supervisors, for voting at a supervisors' meeting against paying the salary of a judge he claimed had not been properly appointed. The court reasoned that the board of supervisors' duty was fixed by law, leaving them no discretion. "They were to 'audit and allow' it by a certain day, under a salary ascertained and fixed by law. . . . Their duty was, therefore, of a ministerial character only. . . ." 3 Denio 395. In *Caswell v. Allen*, 7 Johns. 63 (N.Y. 1810), the court upheld an action against a supervisor of Cayuga County for having voted against a tax to raise funds for a courthouse and jail, in asserted violation of state law requiring that such funds be raised. In other decisions of this era the dispositive issue in holding a member of a municipal governing body

<sup>21</sup> The decision in *Amy* is all the more significant because, prior to the commencement of the suit against the supervisors, Iowa had repealed a state law expressly authorizing damage actions against supervisors who violated their legal duties. This Court rejected the suggestion that that repeal was a bar to *Amy*'s suit. "There is a common law liability which was not affected by the repeal. The statute was only cumulative on the subject." 11 Wall. at 138.

<sup>22</sup> A somewhat more complete account of *Farr* is to be found in 20 L.Ed. 102. Details of *Amy* and *Farr* are set forth in the Transcript of Record, No. 93 and No. 73, respectively, December Term, 1870.

personally liable for his official conduct was whether he had violated a clear legal duty leaving him no discretion.<sup>23</sup>

In these cases, as in *Amy* and *Farr*, nineteenth century courts relied on the distinction between ministerial acts and discretionary acts. Ministerial acts were those in which public officials, including members of local governing bodies, were required (or forbidden) to act in a specific manner, either because the action did not involve the use of discretion, such as the issuance of a properly authenticated liquor license, or because the operation of the law required only one course of action, as in paying a judgment. As *Amy* and *Farr* demonstrate, "ministerial" acts could include conduct such as voting to levy a general tax, that would be considered clearly legislative

<sup>23</sup> See *Bartlett v. Crozier*, 17 Johns. 439, 451 (N.Y. 1820) (commissioners liable for violation of a "certain, stable and absolute duty", but not for the exercise of "discretion"); *Wilson v. the Mayor and City of New York*, 1 Denio 595, 599 (N.Y. 1845) (court distinguished between the discretionary power to "decide when and where . . . [drainage and sewer] works shall be made," for which there was no liability, and the ministerial duty to keep sewers in repair, for neglect of which there was liability); *Wasson v. Mitchell*, 18 Iowa 153, 155-56 (1864) (members of county board of supervisors liable for violation of ministerial duty; where supervisors exercised their "judgment" "[i]t is only necessary that they . . . shall act in good faith; statutory requirements regarding conduct by the supervisors would be 'useless . . . and . . . unavailing . . . if the board or officer could under no circumstances and in no possible event, be held liable for omission or neglect of duty'"); *County Commissioners of Anne Arundel County v. Duckett*, 20 Md. 468, 479 (1863) (commissioners would be liable if they violated a "certain, stable, absolute duty"); *Wall v. Trumbull*, 16 Mich. 228, 234, 42 N.E. 823 (1867) (issue is whether a member of the township board was exercising "judgment or discretion," or has "a line of conduct marked out for him, and he has nothing to do but follow it").

Cases cited by the petitioners simply do not support the proposition that members of local governing bodies could never be personally liable for their official acts. Most of the common law cases they cite specifically support the ministerial-discretionary doctrine. For example, *Hill v. Board of Aldermen of the City of Charlotte*, 72 N.C. 63, 65 (1875), says that there is liability for ministerial acts but not for discretionary acts. "The civil remedy for misconduct in office . . . depends exclusively upon the nature of the duty which has been violated. Where that duty is absolute, certain and imperative — and every ministerial duty is so — the delinquent officer is bound to make full redress." *Freeport v. Marks*, 59 Penn. St. 253, 257 (1868), relied on by *amicus* National League of Cities, *et al.*, says nothing about individual liability of local legislators, but merely says that "the legality of acts of legislative or corporate bodies cannot be tested by the motives of the individual members . . ."

conduct today if done by Congress or a state legislature. Such conduct was nonetheless termed "ministerial" only because the legislative body had no discretion.

The liability of local legislators was clearly recognized in the treatises of the era. The original 1872 edition<sup>24</sup> of John Dillon's Treatise on the Law of Municipal Corporations, cited this Court's decision in *Amy*:

The members of a city council are not individually liable, in a civil or criminal action, for acts involving the exercise of discretion, unless they act corruptly. . . . [There is] liability for nonfeasance or misfeasance, where the duty is specific, imperative, and not judicial, in its nature. . . . In *Amy v. Supervisors* . . . county supervisors were held to be personally liable for failing to levy a tax, as commanded by the court, to pay the plaintiff's judgment. . . .

Law of Municipal Corporations, § 176, p. 214, n. 2.<sup>25</sup>

<sup>24</sup> Petitioners cite to a later, 1881, edition of Dillon. Pet. Br. 24-25.

<sup>25</sup> Cooley's 1880 Treatise on the Law of Torts 377 (1880), expressed the same view:

[W]hen some particular duty of a ministerial character is imposed upon a legislative body, in the performance of which its members severally are required to act — no liberty of action being allowed, and no discretion — there can be a private action for neglect. Such ministerial duties are sometimes imposed upon members of subordinate boards, like supervisors and county commissioners, and when they are, if they are imposed for the benefit of individuals, the members may be personally responsible for failure in performance"

Similarly, Floyd R. Mechem, in his 1890 A Treatise on the Law of Public Offices and Officers, § 647, p. 432 (1890), relied on by the petitioners, Pet. Br. 25, indicates that the distinction between ministerial and discretionary acts remained viable at least through 1890:

But the legislative officer, like the judicial, may be called upon to act ministerially, as when he is required to do some act in a prescribed manner irrespective of his own judgment as to the propriety or desirability of its being done, and in such a case he will be liable to the individual injured by his failure or neglect.

The common law was equally clear that different immunity rules applied for officials at the local level than at the state level. Even though members of state legislatures were absolutely immune from liability when they acted maliciously, members of municipal governing bodies could be held personally liable for their tortious conduct when they used their official powers maliciously or in bad faith.<sup>26</sup> An examination of slander actions against local legislators makes this point. This Court placed great reliance in *Tenney v. Brandhove*, 341 U.S. 367, 373-74 (1951), on *Coffin v. Coffin*, 4 Mass. 1 (1808), which this Court later referred to as "perhaps the earliest American case to consider the import of the legislative privilege." *Spallone v. U.S.*, 493 U.S. at 279. *Coffin*, in dicta, said that a state legislator was absolutely immune from personal liability for slander based on words spoken on the floor of the Massachusetts legislature. Petitioners make much of this case for the proposition that legislative immunity has long been a fixture of American common law. Pet. Br. at 14, 15, 16, 42 and 44. But twenty-three years after *Coffin* and four decades before the 1871 Civil Rights Act, the same Massachusetts court applied a completely different immunity standard to the same cause of action at the local level. In *Bradley v. Heath*, 12 Pick. 164 (29 Mass.) 1831, the Massachusetts Supreme Judicial Court held that a slander action could be maintained against a member of the Town of Brookline Board of Selectmen, based on a statement "spoken in open town-meeting, during an election at which the defendant was acting in his capacity as a public officer," 12 Pick. at 165, so long as the plaintiff could prove that the Selectman had acted with malice:

If the occasion is used merely as a means of enabling the party uttering the slander to indulge his malice, and not in good faith to perform a duty or make a communication useful and beneficial to others, the occasion will furnish no excuse.

<sup>26</sup> See, *Baker v. The State*, 27 Ind. 485, 489 (1867) (even where members of the city common council enjoyed discretion they would be civilly liable if "they acted corruptly"); *Vail v. Owen*, 19 Barb. 22, 26 (N.Y. 1854) (Action against assessors); *Easton v. Calendar*, 11 Wend. 90 (N.Y. 1833) ("[T]hey should not be either civilly or criminally answerable if their motives are pure.").



*Id.* Thus the same state court that found the Massachusetts constitution's speech or debate clause granted absolute immunity from a slander action to a member of the state legislature also found that the common law protected a member of a municipal legislative body in a slander action only when he acted in good faith and did not protect him when he acted maliciously in office.

The common law's unambiguous imposition of personal liability on local legislators in slander actions<sup>27</sup> when they act maliciously or in bad faith is particularly instructive since such actions were the paradigm of the need for absolute state legislative immunity to protect free and uninhibited speech and to permit legislators to speak freely without fear of civil liability.<sup>28</sup> *Tenney*, 341 U.S. at 372-74.

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<sup>27</sup> A majority of the states still permit libel actions against members of local legislative bodies for remarks made during their proceedings. *Prosser and Keeton on Torts*, § 114(2), p. 821 (5<sup>th</sup> ed. 1984). See also 3 Restatement of Torts, § 590, page 236, Comment (c) p. 237. (Absolute immunity "is not applicable to members of subordinate legislative bodies to which the State has delegated legislative powers"); *Harper on Torts*, 1933 Ed., § 248, p. 532 ("This protection [absolute privilege] is confined to members of state and the federal legislature, and does not extend to municipal boards or councils or town meetings"); *Prosser on Torts*, 1941 Ed., p. 828 ("It is generally agreed, however, that the proceedings of subordinate bodies performing a legislative function, such as municipal councils or town meetings, are not within the policy underlying such absolute immunity").

<sup>28</sup> This Court affirmed that view of the common law in regard to immunity in slander actions in *White v. Nichols*, 44 U.S. 266 (1845). See also, *Smith v. Higgins*, 16 Gray (82 Mass.) 251 (1860) (No liability for slanderous statement at town meeting if statement made in good faith and without malice); *McGaw v. Hamilton*, 184 Pa. 108, 113 (1898) (citing *Bradley v. Heath*, *supra*). ("Of course, a member of a legislative body [borough council] cannot take advantage of his official position to give expression to private slanders against others, and then claim that the words were privileged because they were spoken in the course, and as a part, of a public discussion of a pending measure."); *Greenwood v. Corbey*, 26 Neb. 449 (1889) (Absolute immunity from slander action applies to the courts and the state legislature. Members of *quasi* judicial bodies, such as a city council, have good faith immunity. "[I]n cases like that under consideration, we deem the better rule to be that communications of the kind indicated are privileged when made *bona fide*. In other words, when such communications are made against an officer in good faith, and the privilege is not abused, the officer making the charges is not liable.").

Neither the cases prior to 1871 nor the commentators shortly after 1871 support petitioners' contention that members of local legislative bodies were always entitled to absolute immunity. Petitioners rely principally on a single 1877 Mississippi decision in *Jones v. Loving*, 55 Miss. 109, 111 (1877), which holds in part:

It certainly cannot be argued that the motives of the individual members of a legislative assembly, in voting for a particular law, can be inquired into. . . . Whenever the officers of a municipal corporation are vested with legislative powers, they hold and exercise them for the public good, and are clothed with all the immunities of government, and are exempt from all liability for their mistaken use.

If the Mississippi court had indeed adopted the absolute immunity for local "officers" the petitioners suggest and thus departed from the common law distinction between ministerial and discretionary acts<sup>29</sup> such an abrupt change in the law in 1877 would be of no relevance to the understanding of common law immunity held by the members of the 42<sup>nd</sup> Congress in 1871. See, n. 19 *ante*. Further, the reasoning in the above quotation is inconsistent with present § 1983 jurisprudence. Courts in § 1983 cases routinely examine the motives of lawmakers to determine whether a law violates constitutional rights. *Washington v. Davis*, 426 U.S. 229 (1976).<sup>30</sup> Equally importantly, to the extent the Mississippi court found that local legislators are "clothed with" the municipality's immunity, these legislators are left naked by the modern understanding that municipalities have no immunity under § 1983. *Monell v. Dep't. of Social Services of the City of New York*, 436 U.S. 658 (1978).

*Jones v. Loving* simply is not the landmark case the petitioners suggest it is. The case merely fits into the general

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<sup>29</sup> That *Jones v. Loving* did not mark an about face on ministerial liability is demonstrated by Mechem, *supra*, at pp. 431-32. In his 1890 *Treatise* Mechem cites *Jones v. Loving* for the proposition that legislators are not liable for discretionary acts, but on the next page affirms that they are personally liable for actions in which they had no discretion.

<sup>30</sup> In the present case, in fact, the Court of Appeals reversed the judgment against the municipality because there was insufficient evidence of the motivation of the various members of the Fall River City Council. Pet. App. 53-63.

common law scheme that local legislators were generally not personally liable for their discretionary acts but were personally liable when they violated a requirement of law. Petitioners' misreading about *Jones v. Loving* stems from attempting to apply the twentieth century meaning of the term "legislative" powers to a nineteenth century case. The petitioners interpret the phrase "legislative powers" from the above quotation as meaning "the formulation of prospective, legislative-type policies rather than enforcement or application of existing policies." Pet. Br. 36. "Legislative," in the modern sense used by the petitioners, is the opposite of "administrative." In the nineteenth century, however, courts and the commentators used the word "legislative" to mean "discretionary," and as the opposite of "ministerial."<sup>31</sup> This Court recognized that nineteenth century courts used these words in exactly these senses in regard to municipal liability. In *Owen v. City of Independence*, 445 U.S. 622, 644 (1988), in discussing immunities available to municipalities, this Court noted, "The second doctrine immunized a municipality for its 'discretionary' or 'legislative'

<sup>31</sup> The cases and commentators used the words "legislative," "discretionary" and "judicial" virtually interchangeably, all meaning the opposite of "ministerial." For example, in *County Commissioners of Anne Arundel County v. Duckett*, 20 Md. 468, 477-78 (1863)(emphasis added), referring to an earlier case, the court said:

In the former case, as in this, it was contended that the defendants were invested with a legislative discretion, which they had the liberty of exercising as their sense of duty to their constituents dictated, without coercion or liability for its non-user. This court did not sustain that pretension, but held the power in question to be a ministerial one, which the corporation was obliged to exercise for the public good, and in default of its proper exercise, as a common law consequence, it was liable to an action for damages.

Dillon also used the words "legislative," "judicial" and "discretionary" more or less synonymously, as was common practice at the time:

A municipal corporation is not liable to an action for damages either for the non-exercise of, or for the manner in which in good faith it exercises, discretionary powers of a public or legislative character. . . . [L]iability attaches . . . when the duties cease to be judicial in their nature and become purely ministerial.

*Municipal Corporations*, v. 2, § 753, pp. 862-63. (1872).

activities, but not for those which were 'ministerial' in nature." (Emphasis added).

### C. The Immunity Available to Members of Municipal Governing Bodies in 1871 Is Comparable to the Qualified Immunity Available to State Officials in § 1983 Cases Today.

The good faith immunity the common law granted members of local governing bodies is the equivalent of present day qualified immunity. Members of local governing bodies were not personally liable when they acted in good faith but were liable if they acted maliciously or in bad faith.<sup>32</sup> See *Bradley v. Heath*, 12 Pick. (29

<sup>32</sup> The common law discretionary-ministerial act doctrine is the equivalent of having no immunity of any kind under § 1983. In *Owen v. City of Independence*, 445 U.S. at 644, this Court examined the common law "doctrine [that] immunized a municipality for its 'discretionary' or 'legislative' activities, but not for those which were 'ministerial' in nature." That "discretionary-ministerial" doctrine was insufficient to provide any shield from § 1983 liability to a city, this Court said, because cities — and presumably the members of their governing bodies — do not have discretion to violate the Constitution:

Once again, an understanding of the rationale underlying the common law immunity for "discretionary" functions explains why that doctrine cannot serve as the foundation for a good faith immunity under § 1983. That common law doctrine merely prevented courts from substituting their own judgment on matters within the lawful discretion of the municipality. But a municipality has no "discretion" to violate the Federal Constitution; its dictates are absolute and imperative. And when a court passes judgment on the municipality's conduct in a § 1983 action, it does not seek to second-guess the "reasonableness" of the city's decision nor to interfere with the local government's resolution of competing policy considerations. Rather, it looks only to whether the municipality has conformed to the requirements of the Federal Constitution and statutes. . . .

445 U.S. at 649 (Emphasis added).

Members of a city council have no more discretion to violate the First Amendment, as the jury found they did in the present case, than the supervisors in *Amy and Farr* had to disobey court orders. Were this Court to consider only the discretionary-ministerial doctrine as a common law basis for § 1983 immunity for members of local governing bodies the Court would be compelled to draw the same conclusion about that doctrine as it reached in *Owen*: the doctrine does not provide



Mass.) 164 (1831), and notes 26 and 28 *ante*. In *Pierson v. Ray*, 386 U.S. 547, 557 (1967), and subsequent cases, this Court found that the common law provided similar immunity to police officers if they acted in good faith and with probable cause. This Court held that the good faith immunity the common law provided police officers was the equivalent of present day qualified immunity, saying, "the defense of good faith and probable cause, which the Court of Appeals found available to the officers in the common law action for false arrest and imprisonment, is also available to them in the action under § 1983." *Pierson v. Ray*, 386 U.S. at 557. The Court explained that reasoning in *Wyatt v. Cole*, 504 U.S. at 165 (citing *Pierson v. Ray*, 386 U.S. at 555-557), as follows, "[I]n *Pierson v. Ray* . . . we held that police officers sued for false arrest under § 1983 were entitled to the defense that they acted with probable cause and in good faith when making an arrest under a statute they reasonably believed was *valid*. We recognized this defense because peace officers were accorded protection from liability at common law if they arrested an individual in good faith, even if the innocence of such person were later established."<sup>33</sup>

The same reasoning used by this Court in *Pierson*, *Malley*, and *Wyatt* should be applied to the common law immunity available to local legislators. They should have a qualified immunity in § 1983 cases when "their conduct does not violate clearly established

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support for any form of immunity, qualified or absolute. The only basis for granting qualified immunity in this case is the common law history of good faith immunity in slander actions.

<sup>33</sup> This Court followed the same reasoning in *Malley v. Briggs*, 475 U.S. at 340-341, to find that a police officer who improperly applies for an arrest warrant is entitled to qualified immunity, not absolute immunity, based on the common law standard, in 1871, that "in cases where probable cause to arrest was lacking, a complaining witness' immunity turned on the issue of malice, which was a jury question." *Id.* 341. This Court noted that under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), qualified immunity standard "an allegation of malice is not sufficient to defeat immunity if the defendant acted in an objectively reasonable manner." Nonetheless, this Court said, "The *Harlow* standard is specifically designed to 'avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment,' and we believe it sufficiently serves this goal." *Id.* This Court specifically applied the *Harlow* qualified immunity standard based on the rule that common law immunity was defeated by a showing of malice.

statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. at 818. That is the present day equivalent of the standard applied by the common law in 1871 and that standard of qualified immunity "is sufficient to 'protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official immunity.'" *Buckley v. Fitzsimmons*, 509 U.S. at 268 (citing *Butz v. Economou*, 438 U.S. 478, 506 (1978)).<sup>34</sup>

**D. The Public Policy Underlying § 1983 Would Be Better Served by Granting Members of Local Governing Bodies Qualified Immunity Rather than Absolute Immunity.**

**1. This Court should not give local officials greater immunity than was afforded by the common law.**

If this Court finds that members of local governing bodies were not accorded absolute immunity by the common law in 1871, the Court's inquiry should end. The absence of absolute immunity prior to 1871 has been regarded by this court as dispositive where the position in question, like the level of immunity accorded to such individuals, "was known to American common law." *Burns v. Reed*, 500 U.S. 478, 493 (Emphasis in original). This Court has never granted absolute immunity under § 1983 without first finding that the common law in 1871 also provided absolute immunity for persons in the official's position or its equivalent.<sup>35</sup> The linchpin of this Court's

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<sup>34</sup> Petitioners never asserted any qualified immunity probably because they recognized that the right allegedly violated in this case was clearly established.

<sup>35</sup> State officials in positions that were in existence in 1871 have the burden of proving the existence of a common law immunity **at that time** that applied to their specific position. *Tenney v. Brandhove*, 341 U.S. 367 (state legislators); *Pierson v. Ray*, 386 U.S. 547 (state judges, police officers); *Scheuer v. Rhodes*, 416 U.S. 232 (1974) (state governors); *Owen v. City of Independence*, 445 U.S. 622, 637 (1980) (municipalities). When a state official seeks immunity for a position that did not exist in 1871 the Court has looked at how the common law treated analogous positions. See *Tower v. Glover*, 467 U.S. at 921 ("[I]mmunities in this country have regularly been borrowed from the English precedents, and the public defender has a reasonably close 'cousin' in the English barrister"); *Imbler v. Pachtman*, 424 U.S. 409, 423, n. 20 (1976) (Court examined the "functional comparability" of the roles of judge and prosecutor); *Hoffman v. Harris*, 511 U.S. 1060, 1062-63 (1994)

immunity decisions is that Congress is presumed not to have intended to have included in the general language of § 1983 a covert intent to alter the common law immunities prevailing in 1871. Where, as here, a form of immunity which prevailed in 1871 was the equivalent of qualified immunity, the principle that Congress did not intend to alter existing immunities applies with equal force to suggestions that the qualified immunity should be changed to absolute immunity as it does to arguments that qualified immunity should be eliminated.<sup>36</sup>

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(Thomas, J., joined by Scalia, J., dissenting from denial of certiorari)(Noted that social workers did not exist as of 1871 and suggested that courts look for their nearest analogs in the nineteenth century.)

Obviously, city councils, boards of supervisors, boards of aldermen and similar municipal governing bodies were in existence well before 1871 and an extensive body of common law had evolved concerning the liabilities and immunities of members of such bodies. Despite petitioners' arguments that common law cases construing the immunities of members of Congress and state legislators apply with equal force to members of local governing bodies, because there was an extensive body of common law specifically concerning municipal legislators this court should look to that body of law and need not reason by analogy to state or federal legislators. As this Court said in *Imbler v. Pachtman*, 424 U.S. at 421 (emphasis added), "Our earlier decisions on § 1983 immunities were not products of judicial fiat that officials in different branches of government are differently amenable to suit under § 1983. Rather, each was predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it."

<sup>36</sup> Some justices have held that absent a finding that the common law in 1871 provided a state official with absolute immunity this Court can not find such immunity under § 1983 no matter how compelling the public policy reason for doing so may be. See *Burns v. Reed*, 500 U.S. 478, 498 (1991) (Scalia, J., concurring in judgment in part and dissenting in part, emphasis in original) ("While we have not thought a common law tradition (as of 1871) to be a sufficient condition for absolute immunity under § 1983, see *Scheuer v. Rhodes*, 416 U.S. 232 (1974), we have thought it to be a necessary one."); *Buckley v. Fitzsimmons*, 509 US 259, 280 (1993) (Scalia, J., concurring, citations omitted) ("[T]he presumed legislative intent not to eliminate traditional immunities is our only justification for limiting the categorical language of the statute. The policy reasons for extending protection to such conduct may seem persuasive . . . but we simply do not have a license to establish immunities from § 1983 actions in the interests of what we judge to be sound public policy."); *Hoffman v. Harris*, 511 U.S. at 1062 (Thomas, J., joined by Scalia, J., dissenting from denial of certiorari) ("Where we have found that a tradition of absolute immunity did not exist as of 1871, we have refused to grant

## 2. There is no need for absolute immunity for members of local governing bodies.

Absolute immunity, this Court has said, "is 'strong medicine, justified only when the danger of [officials' being] deflected from the effective performance of their duties is very great.'" *Forrester v. White*, 484 U.S. 219, 230 (1988). Qualified immunity "represents the norm." *Malley v. Briggs*, 475 U.S. 335, 340 (1986), quoting *Harlow v. Fitzgerald*, 457 U.S. at 807. "Not surprisingly, [this Court has] been 'quite sparing' in recognizing absolute immunity for state actors in this context." *Buckley v. Fitzsimmons*, 509 U.S. at 269. The reason for this parsimoniousness in granting absolute immunity is that "to extend absolute immunity to any group of state officials is to negate *pro tanto* the very remedy which it appears Congress sought to create."<sup>37</sup> *Imbler v. Pachtman*, 424 U.S. at 434 (White, J., concurring).

This Court made a careful allocation of the societal costs of municipal civil rights violations in *Owen v. City of Independence*, 445 U.S. at 657:

We believe that today's decision, together with prior precedents in this area, properly allocates these costs among the three principals in the scenario of the § 1983 cause of action: the victim of the constitutional deprivation; the officer whose conduct caused the injury; and the public, as represented by the municipal entity. The innocent individual who is harmed by an abuse of

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such immunity under § 1983. . . The federal courts do not have a license to establish immunities from § 1983 in the interests of what [they] judge to be sound public policy"). Similarly, see *Malley v. Briggs*, 475 U.S. at 342: ("Since [§ 1983] on its face, does not provide for any immunities, we would be going far to read into it an absolute immunity for conduct which was only accorded qualified immunity in 1871.")

<sup>37</sup> In speaking of high officials this Court often notes that "[n]o man in this country is so high that he is above the law," *Butz v. Economou*, 438 U.S. 478, 506 (1978); *Nixon v. Fitzgerald*, 457 U.S. 731, 758 (1982); *Clinton v. Jones*, U.S. (1997); *Gravel v. United States*, 408 U.S. 606, 615 (1972). If all members of local governing bodies were absolutely exempted from liability for intentionally violating the constitution an asterisk would have to be added saying, "except for 350,000 people."



governmental authority is assured that he will be compensated for his injury. The offending official, so long as he conducts himself in good faith, may go about his business secure in the knowledge that a qualified immunity will protect him from personal liability for damages that are more appropriately chargeable to the populace as a whole. And the public will be forced to bear only the costs of injury inflicted by the execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy.

In contrast to this Court's formulation, Petitioners' proposed allocation would leave "[t]he offending official" secure in the knowledge that no matter how much he chooses to abuse his governmental power to strike at his enemies, he can never be held financially responsible, and thus leave "[t]he innocent individual who is harmed by an abuse of governmental authority" with no compensation or, at best, would leave taxpayers picking up the bill for intentional illegal conduct if the wrongdoer is sufficiently highly situated in local government. This result does not further the historical purpose of § 1983.<sup>38</sup>

Petitioners contend that creation of absolute immunity is desirable because it would protect local officials from the time and effort involved in defending lawsuits (Pet. Br. 12, 16, 34), would

<sup>38</sup> Because absolute immunity matters only when qualified immunity would be unavailable, this shift in financial responsibility occurs only in cases, such as those involving intentional racial discrimination, in which the city officials in question knew or should reasonably have known that they were violating federal law. It seems inappropriate for federal law to mandate in such cases that financial responsibility should fall on the city rather than on the culpable individuals. Were federal law construed to provide qualified immunity in cases such as this, the city or county involved could always choose to indemnify an official against whom damages were awarded because he had violated clearly established constitutional norms. Thus as a practical matter the absence of absolute immunity would matter to the official and city or county only in those cases in which the government body would have chosen not to provide indemnification. That is a choice which should be left to the government body and state at issue. *Johnson v. Fankell*, U.S. , 117 S. Ct. 1800 (1997).

reduce the risk that fear of litigation might improperly skew their decisions (Pet. Br. 16), and would assure that responsible individuals are not deterred from holding the positions in question. (Pet. Br. 17). All of these purposes, however, are among the goals advanced by qualified immunity. *Butz v. Economou*, 438 U.S. 478 (skewed official decisions), *Wood v. Strickland*, 420 U.S. 308 (skewed official decisions, deterrence from government service); *Harlow v. Fitzgerald*, 457 U.S. 800. (time and effort of litigation). In *Harlow* this Court "completely reformulated qualified immunity . . . to avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment, and we believe it sufficiently serves this goal." *Burns v. Reed*, 500 U.S. at 494-95 n. 8. This Court has already determined that qualified immunity is sufficient to meet all those concerns.

Petitioners recite a catalog of ills that will befall local governments if they do not have absolute immunity. Pet. Br. 15-18. History, however, is dispositive of and fatal to any contention that the absence of absolute immunity for local legislative actions would cause serious and widespread problems for the effective operation of local government. Qualified immunity or its common law equivalent were the controlling legal standard for large periods of time, without any identifiable ill effects during those periods. Under state law only qualified immunity was accorded to local legislative officials prior to and well after 1871. This pattern was, until recently, widely followed in the federal courts in § 1983 litigation. Only in the 1980s did the lower courts begin granting absolute immunity to local officials. In the absence of any evidence that exposure to such liability in all the years prior to 1980 did in fact produce serious consequences for municipalities, there is simply no basis on which to conclude that in the absence of a special federal absolute immunity rule "the danger of [officials' being] deflect[ed from the effective performance of their duties] is very great." *Forrester v. White*, 484 U.S. at 230. Rather than being permitted to speculate about what might happen without absolute immunity, petitioners should be compelled to demonstrate what harm actually did happen before absolute immunity. If anything the volume of recent cases in which courts have attempted to apply their various formulations concerning absolute immunity demonstrate how local officials can now have no

clear idea of when they are immune and when they are not immune from liability.

One of petitioners' major policy reasons for extending absolute liability to members of municipal governing bodies is an assertion that fear that their personal financial exposure would influence the public decisions of these officials. Pet. Br. 16. Forty-six states, however, have statutes either permitting or requiring indemnification of municipal employees in civil rights actions. Those statutes are listed in Appendix A. The almost unanimous enactment of indemnification statutes and the variety of choices the states have made about indemnification of public officials in civil rights actions shows that the states have given great thought to whether local officials should bear the burden of their own wrongdoing. These decisions should be left to the states and local governments, who after all, would be paying the judgments. Additionally, where an indemnification statute is insufficient and municipal decision makers feel that the risk of personal liability is inhibiting their freedom of action, they can have the municipality purchase private insurance.

**3. No workable rule can be created that would give clear guidance to local officials as to when their conduct would be administrative and when it would be legislative.**

Local governments are inherently different from state and federal governments. State governments mirror the separation of powers of the federal government, with separate and distinct executive, judicial and legislative branches. At the state and federal levels the policy of separation of powers, which is at historical foundation of legislative immunity, *Tenney v. Brandhove*, 341 U.S. at 372-75, is well served by legislative immunity. Legislative immunity is protected by the federal constitution and virtually every state constitution.<sup>39</sup> In more than 200 years courts have been called on to determine whether conduct by a Congressman or a member of a state legislature has been legislative or executive in only a handful

<sup>39</sup> No state constitution extends legislative immunity beyond the state legislative level, however.

of cases. By the nature of the doctrine of separation of powers, Congressmen and state legislators have few, if any, executive governmental functions.

Municipal governments in this nation present no such uniform picture.<sup>40</sup> In New England many towns are run by town meetings in which every resident is a legislator and the executive function is in the hands of multi-member boards of selectmen, which, however, function in both legislative and executive capacities between town meetings. Boards of selectmen and boards of commissioners, being multi-member entities, must discuss, deliberate and vote on every decision. Their actions have some of the appearances and forms of legislative activities, even when they are deciding on the most mundane of executive issues, such as the hiring of a single employee. In contrast to New England town meetings, where the legislature is as large as the adult population, some Southern counties have granted the totality of legislative power to a single county commissioner, who simultaneously has the totality of the executive power. *See, Holder v. Hall*, 512 U.S. 874 (1994).<sup>41</sup> Others grant combined executive and legislative power to a multi-member commission. *City of Mobile v. Bolden*, 446 U.S. 55 (1980);<sup>42</sup> *Brown v. Board of Education*, 347 U.S. 483, 639, n. 19 (1955). Some cities, such as Fall River in the present case, have a mayor separate from the city council, with the power to introduce and veto

<sup>40</sup> There are 84,955 units of local government in the United States. Of these, 38,978 are general-purpose local governments — 3,043 county governments and 39,935 subcounty general-purpose governments (including 19,279 municipal governments and 16,656 town or township governments). The remainder, more than half the total number, are special-purpose local governments, including 14,422 school district governments and 31,555 special district governments. 1992 Census, *supra* p. vii. The Bureau of the Census lists nine different forms of local governments, plus "other." *Id.* p. B-2.

<sup>41</sup> "[T]he Bleckley County Commissioner performs all of the executive and legislative functions of the county government, including the levying of general and special taxes, the directing and controlling of all county property, and the settling of all claims. Ga. Code Ann. § 36-5-22.1 (1993). In addition to Bleckley County, about 10 other Georgia counties use the single commissioner system; the rest have multimember commissions." 512 U.S. at 876-77.

<sup>42</sup> "The three Commissioners jointly exercise all legislative, executive, and administrative power in the municipality." 446 U.S. at 59.



legislation but not to vote. Pet. Br. 3-4. In some cities the mayor is a member of the council and votes with other members. *Spallone v. United States*, 403 U.S. at 269.<sup>43</sup> Often multi-member entities are created for the primary if not exclusive purpose of administration. Some multi-member bodies can take action regarding essentially any local issue, while others are restricted to specific topics, such as zoning, schools, tax assessments, or the conduct of elections. The same body that may be elective in one city might be appointed in another. Under these circumstances, it would be imprudent to set about creating some sort of federal common law doctrine attempting to define which local government bodies are "local legislative bodies."

Efforts to create such artificial distinctions regarding local governments in the past have left chaos and confusion among the courts.<sup>44</sup> Similarly, efforts by the lower courts to create formulae to distinguish "legislative" acts from "administrative" ones have created a smorgasbord of theories and results.<sup>45</sup> Rules based on specific

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<sup>43</sup>"Under the Charter of the city of Yonkers, all legislative powers are vested in the city council, which consists of an elected mayor and six council members." *Id.*

<sup>44</sup>In *Owen v. City of Independence*, 445 U.S. at 644, n. 26, this Court referred to the "'nongovernmental'-governmental' quagmire that has long plagued the law of municipal corporations: A comparative study of the cases in the forty-eight States will disclose an irreconcilable conflict. More than that, the decisions in each of the States are disharmonious, and disclose the inevitable chaos when courts try to apply a rule of law that is inherently unsound."

Similarly, this Court noted the confusion caused by efforts to apply the discretionary-ministerial distinction: "Like the governmental/proprietary distinction, a clear line between the municipality's 'discretionary' and 'ministerial' functions was often hard to discern, a difficulty which has been mirrored in the federal courts' attempts to draw a similar distinction under the Federal Tort Claims Act, 28 U.S.C. § 2680(a). See generally 3 K. Davis, *Administrative Law Treatise* § 25.08 (1958 and Supp. 1970)." *Id.* 648, n. 31.

<sup>45</sup>See, *Cutting v. Muzzey*, 724 F.2d 259, 261 (1st Cir. 1984) (articulating two part test focusing on nature of underlying facts used to reach a decision and nature of impact of decision); *Ryan v. Burlington County, NJ*, 889 F.2d 1286, 1290 (3rd Cir. 1989) (actions must be both substantively and procedurally legislative); *Alexander v. Holden*, 66 F.3d 62, 66-67 (4th Cir. 1995) (adopting two part test focusing on general or specific nature of underlying facts relied on in decision making process and general or specific nature of impact); *Hughes v. Tarrant*

conduct, i.e. a rule that voting is per se legislative<sup>46</sup> might work in a purely legislative body with no executive powers, but cannot work with a multi-member executive, such as a board of commissioners, where every clearly executive decision must be decided by a vote. Voting as a test of legislative function obviously would not work where the entire legislative power is delegated to a single county commissioner.

This Court should hesitate before establishing a rule that will revive these unsuccessful legal experiments. This Court should recognize that at the local level there is no workable method of untangling the "legislative" from the "administrative" in a potpourri of governmental schemes specifically designed to blend these functions. Asking the lower courts to separate the "legislative" from the "administrative" in local governments would be like trying to separate the spots from the leopard. The insurmountable difficulties in creating a workable method of differentiating activities that would be protected by absolute legislative immunity from activities that

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*County, Tex.*, 948 F.2d 918, 921 (5th Cir. 1991) (applying test of whether facts relied on were general, legislative facts or specific facts related to broad policy to individual situation); *Haskell v. Washington Township*, 864 F.2d 1266 (6th Cir. 1988) (Zoning ordinance singled out individual and was thus administrative, legislative immunity is absolute, except for bad faith or when not "in furtherance of a reasonably ascertainable legislative activity"); *O'Brien v. City of Greers Ferry*, 873 F.2d 1115, 1119 (8th Cir. 1989) (legislative act involves a formulation of policy governing future conduct of all or a class of the citizenry); *Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 580 (9th Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985) (distinguishing between the formulation and the application of policy); *Smith v. Lomax*, 45 F.3d 402, 405-06 (11th Cir. 1995) (vote by members of county board not to reappoint plaintiff as board clerk did not constitute broad, general policy making and therefore the members were not protected by legislative immunity); *Gross v. Winter*, 876 F.2d 165 (D.C. Cir. 1989) (applies functional approach to determine whether employment action was "legislative" or "administrative," looking at the nature of the conduct of the official). *c.f.*, *Browning v. Clerk, U.S. House of Representatives*, 789 F.2d 923 (D.C. Cir.), *cert. denied*, 479 U.S. 996 (1986) (functional test looks to function of the fired employee to determine whether the employee's function was "directly related to the due functioning of the legislative process")

<sup>46</sup>See *Abraham v. Peharski*, 728 F.2d 167 (3rd Cir. 1984), *cert. den.* 467 U.S. 1242; *Roberson v. Mullins*, 29 F.3d 132 (4th Cir. 1994).

would be protected by qualified executive immunity is reason enough to uniformly grant qualified immunity to all officials.

**4. Experience shows that absolute immunity is most frequently asserted in defense of actions affecting single individuals or businesses.**

An examination of § 1983 cases against members of local governing bodies shows that overall the conduct that preceded such litigation has not involved "rules of general application . . . statutory in character . . . [that] act not on [particular] parties . . . [that] do not arise out of a controversy . . . but instead out of a need to regulate conduct for the protection of all citizens," this Court's description of "legislative" actions. *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 731 (1980). In the vast majority of the reported cases, as here, the litigation concerned actions which arose out of a single controversy and affected, and were directed at, only a handful of particular individuals, and involved no rule of general application.

Most of these cases in which local officials asserted absolute legislative immunity fall into the following categories: (1) Actions directed at particular employees. Most of these cases, as here, involved ordinances or similar measures directed at a single individual; the most common phenomenon, as here, is the enactment of an ordinance to dismiss a specific individual by eliminating his or her job. Appendix B. (2) Race based actions. Appendix C. (3) Speech based actions. Appendix D. (4) Other instances of actions directed at a particular person or controversy, such as a refusal to allow the holding of a concert. Appendix E. *See Newport v. Fact Concerts*, 453 U.S. 247 (1981). (5) Ordinances or resolutions which, although framed in general terms, were in fact directed at and applied to one person or entity. Appendix F. (6) Permit or land use decisions regarding one specific plot of land. These include both the impositions of new restrictions on a specific parcel of land and refusals to grant some form of license or permit in a particular instance. Appendix G. (7) Denials of licenses or permits to particular individuals or business. Appendix H.

These cases show that while decisions regarding specific public jobs, the use of particular land parcels, or the issuance of licenses and permits, are almost never dealt with by state legislatures or Congress, they are grist for the local government mill. The experience of the past twenty years, during which the lower courts' views on absolute local legislative immunity have virtually reversed, demonstrates that in the vast majority of cases in which absolute immunity has been asserted at the local level, the action in question could have been — and in many localities would have been — taken by an administrative official. These cases simply do not often arise from general legislation, affecting the population as a whole.

**5. The Possibility of Relief Against the Municipality is an Inadequate Remedy.**

Petitioners suggest that "individuals who believe their civil rights have been violated by the enactment of unconstitutional legislation may pursue remedies against the municipality itself," Pet. Br. 28, and therefore plaintiffs will not be totally denied a remedy by allowing legislators absolute immunity. This very case belies that suggestion. Since the Court of Appeals held that the plaintiff presented insufficient evidence of the individual motivations of the members of the Fall River City Council to support a judgment against the city, Janet Scott-Harris will be left without a remedy if the individual defendants have absolute immunity.

These facts are far from unique. Proving a single individual's improper motivation is much simpler than proving the motivation of an entire municipal governing board.<sup>47</sup> If individuals are absolutely immune from § 1983 liability Janet Scott-Harris will certainly not be the only person whose rights are violated by government action who will have no relief in the courts.

Additionally, punitive damages would not be available against the municipality. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981). Punitive damages serve important purposes. This

<sup>47</sup> "[P]roof that a municipality's legislative body or authorized decisionmaker has intentionally deprived a plaintiff of a federally protected right necessarily establishes that the municipality acted culpably." *Bd. of County Commissioners of Bryan County, Oklahoma v. Brown*, 117 S.Ct. 1382, reh'g. denied 117 S.Ct. 2472 (1997).



Court justified its decision in *City of Newport*, denying punitive damages against municipalities, by emphasizing their availability against individual defendants.<sup>48</sup> It would be ironic if this Court denied punitive damages against municipalities when their official policy violates clearly established rights because of the availability of a punitive damages award against individual offenders, and then the Court granted absolute immunity to those very same municipal policy makers.

Offering years of costly litigation is not a viable alternative to preventing the violation in the first place. As this Court said in *Ford Motor Co. v. Equal Employment Opportunity Commission*, 458 U.S. 219, 221 (1982), "The claimant cannot afford to stand aside while the wheels of justice grind slowly toward the ultimate resolution of the lawsuit. The claimant needs work that will feed a family and restore self-respect. A job is needed — now." The law should deter violations from happening in the first place, not just offer the prospect of years of litigation after the fact.

#### 6. Resort to the ballot box is not a viable alternative.

Petitioners also suggest that "[c]onstituents who are dissatisfied with the manner in which [officials] exercise their authority may always resort to the ballot box." Pet. Br. 28. Such a suggestion is far removed from reality. Practical experience demonstrates that in most instances involving assertions of absolute immunity at the local level the action in question was directed at only a single individual or business.

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<sup>48</sup> 453 U.S. at 269-70. "Moreover, there is available a more effective means of deterrence. By allowing juries and courts to assess punitive damages in appropriate circumstances against the offending official, based on his personal financial resources, the statute directly advances the public's interest in preventing repeated constitutional deprivations. In our view, this provides sufficient protection against the prospect that a public official may commit recurrent constitutional violations by reason of his office. The Court previously has found, with respect to such violations, that a damages remedy recoverable against individuals is more effective as a deterrent than the threat of damages against a government employer. *Carlson v. Green*, 446 U.S. [14 (1980)] at 21." The converse is also true, the absence of any personal financial exposure should embolden local officials weighing the risks of violating constitutional mandates.

A fundamental purpose of § 1983 is to protect minorities from the political strength of the majority.<sup>49</sup> Petitioners place far too heavy a burden on an African-American woman in an overwhelmingly white city to expect that she would have enough political power at the next city council election to make her dismissal a significant issue. Persons fired from their jobs have more important tasks to face than organizing electoral revenge. It is unrealistic to expect powerful politicians will have much to fear at the ballot box from individual members of minority groups who are singled out for unconstitutional treatment.

#### 7. Granting absolute immunity to local officials would open the door to abuse of the privilege.

Extending liability-free authority to violate the civil rights laws to nearly 350,000 people — people who have the closest daily contact with citizens and who generate by far the most civil rights litigation — would go a long way toward eviscerating § 1983. Before taking such a step the Court should consider who would be protected by absolute immunity who would not have been protected by qualified immunity. As this Court said in *Burns v. Reed*, 500 U.S. at 494-95 (emphasis added), citing *Malley v. Briggs*, 475 U.S. at 341, "As the qualified immunity defense has evolved, it provides ample support to all but the plainly incompetent or those who knowingly violate the law." Should such persons contemplate taking a clearly unconstitutional action, absolute immunity would encourage them, fear of personal liability would give them pause. "Where an official could be expected to know that his conduct would violate statutory or constitutional rights, he *should* be made to hesitate. . ." *Harlow v. Fitzgerald*, 457 U.S. at 819, with emphasis added by the Court in *Mitchell v. Forsyth*, 472 U.S. at 524. This Court noted in *Owen v. City of Independence*, 445 U.S. at 656, "Whatever other concerns should shape a particular official's actions, certainly one of them should be the constitutional rights of individuals who will be affected by his actions. To criticize section 1983 liability because it leads

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<sup>49</sup> African-Americans make up approximately 1 percent of the population of Fall River. See n. 1 *ante*.

decisionmakers to avoid the infringement of constitutional rights is to criticize one of the statute's *raisons d'être*."

## II. THE ACTIONS AT ISSUE IN THIS CASE ARE NOT "LEGISLATIVE."

Even if absolute immunity is available for the legitimate legislative acts of local officials, the conduct at issue in this case falls outside any such protection. If petitioners' conduct is considered legislative for immunity purposes, in light of the jury's conclusions, then legislative immunity would become a cloak for lawlessness.<sup>50</sup> Soon after the lower courts began holding that local legislators had absolute immunity those courts began to see cases in which local officials used their immunity to serve their political ends.<sup>51</sup> In

<sup>50</sup>The First Circuit and several other courts of appeal, see note 45 *ante.*, analyze whether the facts on which legislation at issue were based are "legislative facts," meaning "generalizations concerning a policy or state of affairs." See Pet. App. at 64, citing *Cutting v. Mazzei*, 724 F.2d 259, 261 (1<sup>st</sup> Cir. 1984). In some cases, such as the present one, this inquiry requires a factual determination by the jury as to the motivation of the persons who enacted the ordinance. If, for example, petitioners' roles in passing the ordinance were based on financial concerns and an intention to reorganize city government, then these would be "legislative facts" and their conduct could be considered "legislative." If, as the jury found, they were motivated by a desire to retaliate against respondent because of her constitutionally protected speech, then their conduct would not be considered "legislative" because it was aimed at a particular individual and was not based on legitimate legislative interests. See *Doe v. McMillan*, 412 U.S. 306, 328 (1973) (Douglas, J. concurring, emphasis in the original) ("Violations of the commands of the First Amendment are not within the scope of a legitimate legislative purpose"); *City of Cleburne, Texas v. Cleburne Living Center, Inc.*, 473 U.S. 432, 447 (1985) (citing *United States Dept. of Agriculture v. Moreno*, 413 U.S. 528 (1973)) ("[S]ome objectives — such as 'a bare . . . desire to harm a politically unpopular group,' 413 U.S. at 534 — are not legitimate state interests"). That analysis is the short answer to the question of whether the conduct in this case was "legislative." Since the jury found the petitioners' conduct did not involve any legitimate legislative activity, they have no legislative immunity.

<sup>51</sup>As examples of the conduct faced by the lower courts see *Burnik v. McLean*, 76 F.3d 611 (4th Cir. 1996) (Board simultaneously abolished job of white, Jewish worker and created new job with similar responsibilities then filled with non-Jewish new employee); *Carver v. Foerster*, 102 F.3d 96, 98 (3d Cir. 1996) (Plaintiffs fired on January 3; resolution eliminating their jobs not proposed until January 8, passed on January 16); *Alexander v. Holden*, 66 F.3d 62, 63 (4th Cir. 1995) (After

*Supreme Court of Virginia v. Consumers Union*, 446 U.S. at 731, this Court held the regulations at issue were "legislative" because they were "rules of general application . . . statutory in character . . . [that] act not on [particular] parties . . . [that] do not arise out of a controversy . . . but instead out of a need to regulate conduct for the protection of all citizens." Conversely, as this Court stressed in *Forrester v. White*, 484 U.S. at 228, an action cannot be characterized as inherently judicial, or inherently legislative, if it could just as readily have been done by an administrative official. 484 U.S. at 228. Judged by those standards this is not a close case. The ordinance abolishing respondent's job can hardly be characterized as "a rule of general application;" it can hardly be called a rule at all. The mayor admitted he could have saved the exact same amount of money by firing her on his own as by having the city council do it.<sup>52</sup> Petitioners concede that absolute legislative immunity would have been unavailable if they had adopted a resolution simply dismissing respondent.<sup>53</sup>

abolishing salary for Clerk, thus effectively dismissing Democratic employee, Republican-controlled board then created a new Secretary-Clerk position with same responsibilities and appointed a prominent Republican); *Orange v. County of Suffolk*, 830 F. Supp 701 (E.D.N.Y. 1993) (Proposal to eliminate 16 positions allegedly for partisan reasons; position of one employee removed from list when he joined Republican Party and made \$15,00 contribution; three Republicans whose positions were eliminated all given other jobs, non-Republicans demoted or fired); *Baker v. Mayor and City Council of Baltimore*, 894 F.2d 679, 680-80 (4th Cir. 1990) (Resolution abolishing plaintiff's position but creating a new differently titled position with similar responsibilities); *Bryant v. Nichols*, 712 F.Supp 887 (M.D. Ala. 1989) (After demoting plaintiff, mayor asked city council to vote to endorse his actions); *Rateree V. Rockett*, 630 F.Supp 763 (N.D. Ill 1986) (Council repeatedly abolished whatever jobs alleged political opponents were appointed to); *Aitchison v. Raffiani*, 708 F.2d 96 (3d Cir. 1983) (Ordinance abolishing plaintiff's job held to be in bad faith serving as a subterfuge to avoid the civil service hearing process).

<sup>52</sup>Mayor Bogan admitted he had statutory authority to do so under Mass. G.L. c. 43 § 54. See Tr. Trans. 6:67, Trial Ex. 85

<sup>53</sup>"Termination of employee without eliminating position . . . is not shielded by absolute immunity doctrine . . . decision to hire or fire [is] generally considered administrative." (Pet. Br. 38-39). This concession is compelled by this Court's decision in *Forrester v. White*, 484 U.S. 219, which held that the dismissal of a judicial employee by a judge was not protected by absolute judicial immunity. Thus there would be no possible claim of legislative immunity if a city council



Petitioners argue that an action is "quintessentially legislative," if it involves budget making or the expenditure of funds, with no reference to the motivation for enacting the ordinance. Pet. Br. 36. In this view absolute immunity attaches to any action regarding the expenditure of governmental funds, such as ordinances reading:

"No city funds shall be used to pay the salary of Janet Scott-Harris,"

"No city funds shall be expended to teach Hispanic students in majority white schools,"

"No city funds shall be expended to arrest, jail or prosecute arsonists who set fire to black churches."

It is inconceivable that city officials could escape liability under § 1983 in this manner. Judge White, in *Forrester v. White*, surely would not have been entitled to absolute immunity if, instead of firing Cynthia Forrester, he had refused to allocate funds for her position, spending them instead on a new employee doing similar work. If local officials could obtain absolute immunity merely by recasting a directive as a budgetary matter, only the most inept miscreants would fail to acquire such immunity for even the most blatant violations of clearly established constitutional norms.

Further, would budget making remain quintessentially legislative if done by an executive? Executive and judicial officials at all levels of state and local governments routinely make budgetary decisions allocating funds to or from specific purposes, ranging from purchases of several hundred dollars to projects costing billions. A decision by Washington Metro executives to reduce expenditures by closing the trains at 11 p.m. rather than midnight would involve far more money than was at stake in the instant case. If the mere fact that a decision was about, or affected, the expenditure of funds rendered it "quintessentially legislative," much of the work of executive officials would fall within that definition.<sup>54</sup>

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adopted an ordinance stating "Janet Scott-Harris is hereby dismissed" or "The Mayor shall immediately dismiss all city employees who are African-American."

<sup>54</sup> Since legislative immunity analysis "looks to the nature of the function performed, not the identity of the actor who performed it," *Buckley v. Fitzsimmons*, 509 U.S. at 269, under Petitioners' formulation any official involved in "[o]rdering

Petitioners urge, in the alternative, that any decision that eliminates a specific government job, rather than a specific government employee, is necessarily legislative. (Pet. Br. 33, 38, 39-40). Again, however, executive officials routinely take such action. Shortly after taking office President Clinton eliminated a substantial number of White House staff positions. Would petitioners label his conduct in doing so as "legislative"? Judge White would not have been entitled to absolute immunity if, instead of firing Forrester, he had for the purpose of getting rid of her simply abolished the position of Project Supervisor of the Jersey County Juvenile Court Intake and Referral Services Project. *Forrester v. White*, 484 U.S. at 221. Were such a scheme sufficient to acquire constitutional immunity, no liability would attach for approving an ordinance reading:

"All jobs held by Catholics are hereby eliminated."

"The position of assistant secretary of the Mayor will be abolished as of January 1, 1998, unless the person now occupying that position agrees to have sexual relations with the Mayor."

If § 1983 permitted such schemes, that statute would constitute a manual of techniques for violating those rights with impunity, not a measure to remedy violations of federal constitutional rights.

Petitioners contend, third, that local legislators' motives for enacting "facially neutral" ordinances can not be considered in determining whether their conduct was legitimate legislative activity. (Pet. Br. 31-32). In this view absolute immunity would attach to measures such as:

"Linda Brown may not attend Sumner Elementary School."<sup>55</sup>

"Louis and Fern Shelley may not reside in the house previously owned by J.D. and Ethel Kramer."

In petitioner's view, absolute legislative immunity from the 1871 Ku Klux Klan Act would attach even though the city council members wore white robes and hoods and openly proclaimed that their intent

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budget priorities," Pet. Br. 36, should be entitled to absolute legislative immunity, not just members of "legislative" bodies. Such a formulation would leave few public officials responsible for § 1983 violations.

<sup>55</sup> Richard Kluger, "Simple Justice," Vol. 1, p. 515 (1975).

was to "fire every Jew," to "dismiss Scott-Harris because African-Americans should not object to racist remarks" or "to preserve segregation now and forever." Petitioners argue that it would be unthinkable for a federal court to inquire into the motives of a state or local legislator. (Pet. Br. 32 and n. 12). But this Court routinely engages in precisely such inquiries to determine whether a state law was adopted for a constitutionally impermissible racial purpose. *Washington v. Davis*, 426 U.S. 229. The directive dismissing Cynthia Forrester was presumably facially neutral; in ruling that judges do not enjoy absolute immunity for dismissing their employees, this Court in *Forrester v. White* necessarily held that the lower courts could inquire into Judge White's motives to ascertain whether he had acted with a covert intent to discriminate on the basis of sex. See also, *Davis v. Passman*, 442 U.S. 228 (1979). The resolution of the merits of discrimination claims invariably requires the trier of fact to ascertain whether the facially neutral justification proffered by the defendant for the disputed action is in fact a pretext. *McDonnell Douglas v. Green*, 411 U.S. 792 (1973). Surely the mere assertion of such a pretext, or of a particular type of pretext such as saving money, cannot entitle a defendant to absolute immunity, without regard to whether that assertion is factually false.

### III. PETITIONERS' CONDUCT WAS THE PROXIMATE CAUSE OF PLAINTIFF'S LOSS OF EMPLOYMENT.

#### A. Petitioners failed to preserve their appellate rights as to their proximate cause argument.

Petitioners present an argument concerning proximate causation that they first made following the decision by the First Circuit Court of Appeals in their Joint Petition for rehearing. Petitioners now argue that there was insufficient evidence, indeed no

evidence at all, that their actions caused respondent's dismissal.<sup>56</sup> This argument is unavailing.

Both the Federal Rules of Civil Procedure and the Seventh Amendment require a litigant wishing to object to the sufficiency of the evidence at trial to do so in a timely manner before the matter is submitted to the jury and again after the verdict. Neither party filed either a motion for a directed verdict or for judgment n.o.v. on the same proximate cause ground now advanced in this Court.<sup>57</sup>

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<sup>56</sup> "There was *no* evidence introduced that either of the individual defendants made any ongoing or improper efforts to induce other Councillors to act for illicit or impermissible reasons." Pet. Br. 46-47 (Emphasis in original). Similarly they argue that "[t]here was no evidence that either Bogan or Roderick helped shape or exercised any influence over the other City Councilors' decision to vote in favor of the position-elimination ordinance." Pet. Br. 48. Not only are these statements factually inaccurate, but the Supreme Court is the wrong venue to first raise this specific argument on the sufficiency of the evidence at trial. Even now, Petitioners make this argument on the sufficiency of the evidence without a single reference to the trial transcript, in effect asking this Court to read the entire record.

<sup>57</sup> The closest Roderick came to the issue of proximate cause in her directed verdict motion was to state that "there is insufficient evidence upon which a jury would be warranted in finding that the elimination of the position of Administrator, Health & Human Services, was a proximate cause of injury or damages to the plaintiff." (App. 135, emphasis added). She did not argue that her own conduct was not a proximate cause of the city council's action, the issue she raises in this Court. The record is even less supportive of Bogan. The docket (App. 18) shows motions for directed verdicts filed by the defendants Roderick (No. 68) and Fall River (No. 67) immediately after the plaintiff's opening statement, but not by Bogan. The docket shows both motions denied on 5/16/94. (App.20).

The docket shows no written directed verdict motions filed by Bogan either at the close of the plaintiff's case or at the close of the evidence. The Appendix in this Court includes written directed verdict motions on behalf of Fall River (App. 129) and Roderick (App. 133) but not for Bogan. The Court of Appeals Appendix similarly includes directed verdict motions by Fall River and Roderick but not Bogan. The docket shows an entry for 5/24/94 "motions to dismiss ans (sic) for directed verdict; hearing on record; ALLOWED on def. Robert Connors; DENIED on other 2 defts Bogan and Roderick. (App. 22). The trial transcript for that day, the "hearing on the record," (Trial Trans.7:20-25) includes only the following:

MR. FULTON: Your Honor, the City of Fall River has a Motion for Directed Verdict that I want to file.

MR. ASSAD: Judge, on behalf of Marilyn Roderick and Connors, we would renew the motion that we have submitted to you at the close of the opening for a directed verdict.



Neither party raised this same factual contention in their Court of Appeals brief.<sup>58</sup> The Seventh Amendment precludes this Court from entertaining this fact-bound argument.

Proximate cause is normally a fact question.<sup>59</sup> In the present case, the jury was instructed, without objection, on proximate cause

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MR. MARCHAND: On behalf of Daniel Bogan, I make the same request.

The judge's response was to allude to an off-the-record conference the prior day. See Trial Trans 7:20. She then said, "With respect to the other defendants [besides Connors], I deny the Motion for Directed Verdict, but I will re-examine again at the close of the case this whole issue of legislative immunity. . . ."

Counsel for all three defendants orally renewed their directed verdict motions at the close of the evidence, without argument. (Ct. of Appeals App. 988-89). The result is that there is no record of Bogan having filed any written directed verdict motions. There is no record of the substance of Bogan's oral directed verdict motion, except that his counsel said he renewed the motion made after the opening, of which there is no record.

Bogan (App. 161) and Roderick (App. 159) filed motions for judgment notwithstanding the verdict. Bogan's J.N.O.V. motion simply states that he moves for judgment "on the grounds set forth in its (sic) motions for directed verdict made at trial." Roderick's motion states as grounds "the grounds set forth in her motions for directed verdict made at trial and on the ground that Marilyn Roderick is entitled to absolute immunity." See also, District Court Memorandum of Decision and Order on Defendant's Motions for Judgment Notwithstanding the Verdict. (App. to Petition, App. 15-16). (Nowhere in her listing of the issues raised by the directed verdict motions — or anywhere else in her Memorandum and Order — does the trial judge mention the words "proximate cause.")

Based on this trial record there is no evidence that Bogan or Roderick preserved the issue of whether the evidence was sufficient to prove their conduct was a proximate cause of the elimination of the plaintiff's employment, either at the close of the plaintiff's evidence or at the close of all the evidence.

<sup>58</sup> Roderick did raise that issue, but only in regard to herself, Consolidated Brief of the Defendants-Appellants p. 82-3, and without citing any authorities and only to the extent of saying that since the position elimination ordinance passed by a vote of 6 to 2, even if she would have voted against the ordinance it would have passed. Her present proximate cause argument is completely different. Their present proximate cause argument, in a different form, was first raised in their Joint Petition for Rehearing in the Court of Appeals, after new counsel had appeared.

<sup>59</sup> See, *Exxon Company, U.S.A. v. Sorec, Inc.*, 116 S. Ct. 1813 (1996) ("The issues of proximate causation and superceding cause involve application of law to fact, which is left to the factfinder, subject to limited review. See, e.g., *Milwaukee & St. Paul R. Co. v. Kellogg*, 94 U.S. 469, 473-476 (1877); [W.] *Keeton, Prosser and Keeton on Torts* 320-321 [5<sup>th</sup> ed. 1984]; 5 [A.] Corbin, [Corbin on Contracts] § 998 at 22-23 [1964].")

as to each defendant.<sup>60</sup> The jury answered specific, separate interrogatories on causation. App. 151-52. Petitioners did not object to either the jury instructions or the jury interrogatories at trial or on appeal. Petitioners' failure to object should bar them from raising this issue at this point.<sup>61</sup> Fed. R. Civ. P. 51. *City of Springfield v. Kibbe*, 480 U.S. 257, 259 (1987).

The evidence is more than sufficient to support the jury verdict. Mayor Bogan framed and proposed the resolution that eliminated the respondent's job. It would be entirely normal for the city council to approve an ordinance submitted for approval by the mayor. Petitioner Roderick chaired the city council ordinance committee that approved this proposal and then referred it with approval to the full council. Such committees are delegated primary responsibility to review proposed ordinances and to recommend passage or rejection to the council. Petitioners certainly offered no evidence that the council's action would have happened in any event even if the mayor had not requested it or if Roderick had not approved the proposal and recommended that it be passed by the city council.

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<sup>60</sup> Judge Saris' detailed jury instruction on causation is at pages 212 and 213 of the Appendix. Further, Judge Saris instructed the jury that "there are three separate defendants here, as I mentioned before. So that you must make a separate determination under the law with respect to each one separately." (App. 204).

<sup>61</sup> Petitioners waived their present argument by agreeing to the form of the jury interrogatories. These interrogatories are totally objective; did Act A cause Result B? They did not ask the jury to consider whether Bogan's and Roderick's "allegedly improper motivations" were "infused" into "the deliberative and collective decision making process," the legal standard they now assert. Pet. Br. 45. They did not ask the jury to find whether the city council members were "mere conduits for the defendants' unlawful motivations because they directly relied upon the individual defendants' improper information," Pet. Br. 46, a factual finding they now say is a legal prerequisite to liability. We don't know if the jury believed the council members relied on Bogan and Roderick because Petitioners never requested that the jury be asked to decide that.

**B. Applying general tort principles of causation, since the elimination of plaintiff's position was a foreseeable and expected result of the petitioners' conduct, that conduct was the proximate cause of plaintiff's injuries.**

Petitioners ask this Court to find that by submitting their scheme to remove the plaintiff from city government to the City Council, which they say was innocent of their evil motives, their bad intentions were bathed away.<sup>62</sup> The novelty of this argument is demonstrated by Petitioners' failure to cite a single authority for their proposition that they could not "have been the proximate cause of any actionable injury to Scott-Harris under these circumstances." Pet. Br. 48-49 (Emphasis in original).<sup>63</sup>

This contention ignores basic tort notions of proximate causation. Petitioners do not deny that the evidence was sufficient to find they conceived a plan to remove Janet Scott-Harris from Fall River City Hall, that they set that plan in motion, and that their plan proceeded exactly as anticipated, and ultimately succeeded. Petitioners contend, in effect, that because they could not complete their plan without the help of innocent third parties, they are legally entitled to a share of that innocence.

In a similar situation in *Malley v. Briggs*, 475 U.S. 335, a district court had found that the conduct of a magistrate in issuing arrest warrants based on false affidavits by a police officer "broke the causal chain between [the police officer]'s filing of a complaint and respondents' arrest." 475 U.S. at 339. This Court rejected that finding, saying, "It should be clear, however, that the District Court's 'no causation' rationale in this case is inconsistent with our

<sup>62</sup> This Court rejected that notion in a similar context. In *Dennis v Sparks*, 449 U.S. 24, 27 (1980), this Court held that a private corporation that conspired with a state judge can be liable under § 1983 even though the judge himself has absolute immunity and even though the harm could not have been inflicted but for the judge's actions.

<sup>63</sup> Their sole citation to dicta in *Douglas v. Jeannette*, 319 U.S. 157, 165 (1942), does not even approach their position.

interpretation of § 1983. As we stated in *Monroe v. Pape*, 365 U.S. 167, 187 (1961), § 1983 'should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.' Since the common law recognized the causal link between the submission of a complaint and an ensuing arrest, we read § 1983 as recognizing the same causal link." 475 U.S. at 345 n. 7. *Malley* should be contrasted with *Martinez v. California*, 444 U.S. 277, 285 (1980), a § 1983 action in which the Court held that a murder committed by a sex offender five months after his release on parole was too remote to impose liability on the parole board that released him.

"The background of tort liability that makes a man responsible for the natural consequences of his actions," *Monroe v. Pape*, 365 U.S. at 187, has been discussed by this Court repeatedly. In *Babbitt v. Sweet Home Chapter, Communities for a Great Oregon*, U.S. , 115 S.Ct. 2407 (1995)(O'Connor, J., concurring), Justice O'Connor noted that "[p]roximate causation depends to a great extent on considerations of the fairness of imposing liability for remote consequences. The task of determining whether proximate causation exists in the limitless fact patterns sure to arise is best left to lower courts."<sup>64</sup>

Petitioners suggest that "the independent action of the official decisionmaker to enact a facially benign ordinance for proper reasons, must be a superseding cause severing the causal connection between the individual legislators' allegedly improper animus and Scott-Harris' alleged injury."<sup>65</sup> Pet. Br. 48. This Court recently

<sup>64</sup> *Id.* "We have recently said that proximate causation 'normally eliminates the bizarre,' *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527 (1995), and have noted its 'functionally equivalent' alternative characterizations in terms of foreseeability, see *Milwaukee & St. Paul R. Co. v. Kellogg*, 94 U.S. 469, 475 (1877) ('natural and probable consequence'), and duty, see *Palsgraf v. Long Island R. Co.*, 248 N. Y. 339, 162 N. E. 99 (1928). *Consolidated Rail Corp. v. Gottshall*, 512 U.S. [532], [546] (1994)."

<sup>65</sup> Petitioners did not request an instruction on superseding or intervening causation. They should not complain that the jury did not find the action of the city council was a "superseding cause" (Pet. Br. 48) when they failed to ask that the jury be instructed about that legal theory. Of course, the whole theory of superseding force interrupting causation derives from negligence actions, not from intentional torts. In intentional torts, comparable to § 1983 actions, it is entirely fair to hold a



defined the standard for when a subsequent event breaks the chain of proximate causation. "[A]n intervening force supersedes prior negligence and this breaks the chain of proximate causation required to impose liability on the original actor . . . 'where the subsequent actor's negligence was 'extraordinary' (defined as 'neither normal nor reasonably foreseeable.')" *Exxon Companies, U.S.A. v. Sorec, Inc., supra*. In *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 477 n. 13 (1982), this Court said, "The traditional principle of proximate cause suggests the use of words such as 'remote,' 'tenuous,' 'fortuitous,' 'incidental,' or 'consequential' to describe those injuries that will find no remedy at law." This same view is accepted by the Restatement (Second) of Torts § 443 (1965), which says, "The intervention of a force which is a normal consequence of a situation created by the actor's negligent conduct is not a superseding cause of harm which such conduct has been a substantial factor in bringing about." See also *id.* § 442 (standards for foreseeability).

The enactment of the ordinance by the City Council was an entirely foreseeable — in fact an anticipated<sup>66</sup> — result of Mayor Bogan submitting the ordinance and Councilwoman Roderick shepherding it through the Ordinance Committee and then voting for it. Nothing done by the City Council, therefore, was sufficient to act as an unforeseeable superceding force of sufficient unexpected magnitude to break the chain of causation begun by the two individual defendants. The result of the City Council action — Scott-Harris' removal from City Hall — was the precise result anticipated, foreseen and, as the jury found, desired by Bogan and Roderick.

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person liable for harm he consciously intended to cause, even if some unexpected force helped that harm to occur.

<sup>66</sup> Bogan notified the City Clerk that Scott-Harris' position was eliminated even before the ordinance was enacted by the City Council. (Court of Appeals App. 1274 and 1275).

## CONCLUSION

For the foregoing reasons, the Appellant Janet Scott-Harris respectfully requests that this Court hold (1) that municipal and local officials are entitled to no more than qualified immunity for actions taken in their legislative capacities; (2) that the actions taken by Petitioners were not of such a legislative nature as to entitle them to absolute legislative immunity; and (3) that the First Circuit Court of Appeals properly found that Petitioners' conduct was the proximate cause of Respondent's injuries. Respondent respectfully requests that this Court affirm the decision of the Court of Appeals of the First Circuit and the district court below, and remand this matter to the district court for assessment of attorneys fees and entry of judgment.

Dated: October 3, 1997

Respectfully submitted,

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## APPENDIX A

## State indemnification statutes

Ala. Code §11-47-24, Ark. Code Ann. §21-9-201 (Michie 1987), Cal. Government Code §§825 and 995 (West 1993), Colo. Rev. Stat. §24-10-110 (West 1990), Conn. Gen Stat. §7-465 (1997), Fla. Stat. Ann. § 111.07, et. seq. and 768.28, Ga. Code. Ann. § 45-9-60 (1990), Haw. Rev. Stat. §§661 and 662, Idaho Code §6-903 (1990), 745 Ill Comp. Stat. 10/2-302 (1994), Ind. Code Ann. §34-4-16.7-1 (Michie 1986), Iowa Code Ann. §670.8 (West 1997), Kan. Stat. Ann. §75-6109 (1989), Ken. Rev. Stat. Ann. §65.2005 (Michie 1994), La. Rev. Stat. Ann. §13-5108 (West 1997), Me. Rev. Stat. Ann. tit. 14, §8112 (West 1996), Md. Code Ann., Courts and Judicial Proceedings §5-403 (1995), Mass. Gen Laws ch.258, §13 (1988), Mich. Comp. Laws. Ann. §691.1408 (1997), Minn. Stat. Ann. §466.07 (West 1994), Miss. Code Ann. §11-46-7 (1972), Mo. Ann. Stat. §105.711 (1997), Mont. Code Ann. §2-9-305 (1994), Neb. Rev. Stat. Ann. §81-8239.05 (Michie 1995), Nev. Rev. Stat. Ann. §41.0349 (1989), N.H. Rev. Stat. Ann. 29-A:2 (1988), N.J. Stat. Ann. §59:10-1-10 (West 1992), N.M. Stat. Ann. §41-4-23 through -25 (1996), N.Y. Public Officer's Law §18 (McKinney's 1997), N.C. Gen. Stat. §143.300.6 (1996), N.D. Cent. Code §32-12.1-04(4) (Supp. 1993), Ohio Rev. Code Ann. §2744.07 (Banks-Baldwin 1994), Ok. Stat. Ann. tit. 51, §162 (Supp. 1995), Or. Rev. Stat. §30.285 (1988), 42 Pa. Cons. Stat. Ann. §8548 (1982), R.I. Gen. Laws §45-15-16 (1991), S.C. Code Ann. §15-78-60 (Law. Co-op. 1996), S.D. Codified Laws §3-19-1 (1994), Tenn Code Ann. §29-20-310 (1996 Supp.), Tex. Loc. Gov't. Code § 157.903 (1997 Supp.), Utah Code. Ann. § 63-30-36 (1993), Vt. Stat. Ann. 3 §1101 et. seq., Wash. Rev. Code Ann. § 4.96.041 (1997 Supp.), W. Va. Code § 29-12A-11 (1992), Wis. Stat. Ann. §895.46 (1997), Wyo. Stat. Ann. §1-39-104 (Michie 1997).



## APPENDIX B

**Assertions of Legislative Immunity  
Regarding Individual Employment Decisions**

*Carver v. Foerster*, 102 F.3d 96 (3d Cir. 1996) (jobs of four working abolished after the supported unsuccessful candidate for local office).

*Burtnik v. McLean*, 76 F.3d 611 (4th Cir. 1996) (position of plaintiff abolished; new position with similar duties created instead).

*Alexander v. Holden*, 66 F.3d 62 (4th Cir. 1995) (resolution eliminating salary for one position).

*Smith v. Lomax*, 45 F.3d 402 (11th Cir. 1995) (dismissal of one employee).

*Berkley v. Common Council of City of Charleston*, 63 F.3d 295, 300-03 (4th Cir. 1995) (denial of causes to six identified employees).

*Roberson v. Mullins*, F.3d 132 (4th Cir. 1994) (dismissal of one employee).

*Rabkin v. Dean*, 856 F. Supp. 543 (N.D.Cal. 1994) (denial of salary increase to one employee).

*Racine v. Cecil County, Md.*, 843 F. Supp. 53 (D.Md. 1994) (jobs of four employees eliminated).

*Reitz v. Persing*, 831 F. Supp. 410 (M.D.Pa. 1993) (one employee dismissed).

*Rogers v. Mount Union Borough*, 816 F. Supp. 308 (M.D.Pa. 1993) (one employee dismissal).

*Orange v. County of Suffolk*, 830 F. Supp. 701 (E.D.N.Y. 1993) (nine employees demoted or fired).

*Christian v. Cecil County, Md.*, 817 F. Supp. 1279 (D.Md. 1993) (dismissal of three employees).

*Yeldell v. Cooper Green Hosp. Inc.*, 956 F.2d 1056 (11th Cir. 1992) (two employees fired, one demoted, one suspended without pay).

*Freeman v. McKellar*, 795 F. Supp. 733 (E.D.Pa. 1992) (dismissal of one employee).

*Acevedo-Cordero v. Cordero-Santiago*, 958 F.2d 20 (1st Cir. 1992) (purge of identified members of the New Progressive Party by electively abolishing their jobs).

*Draughon v. City of Oldsmar*, 767 F. Supp. 1144 (M.D. Fla. 1991) (budget eliminated funding for position of one employee).

*Bryant v. Nichols*, 712 F. Supp. 887 (M.D.Ala. 1989) (demotion of a single employee).

*Finch v. City of Vernon*, 877 F.2d 1997 (11th Cir. 1989) (abolition of a single job).

*Gross v. Winter*, 876 F.2d 165 (D.C. Cir. 1989) (dismissal of single employee).

*Drayton v. Mayor and Council of Rockville*, 699 F. Supp. 1155 (D. Md. 1988) (position of one employee eliminated).

*Herbst v. Daukas*, 701 F. Supp. 964 (D.Conn. 1988) (one employee demoted after his previous position was eliminated).

*Rateree v. Rockett*, 852 F.2d 946 (7th Cir. 1988) (abolition of jobs of four employees).

*Healy v. Town of Pembroke Park*, 831 F.2d 989 (11th Cir. 1987) (city decision to abolish jobs of four police officers found to have been made to retaliate against police union for filing grievances).

*Ditch v. Board of County Commissioners of County of Shawnee*, 650 F. Supp. 1245 (D.Kan. 1986) (elimination of position of one employee).

*Kuchka v. Kile*, 634 F. Supp. 502 (M.D.Pa. 1985) (dismissal of one employee).

*Meding v. Hurd*, 607 F. Supp. 1088 (D.Del. 1985) (dismissal of one employee).

*Hudson v. Burke*, 617 F. Supp. 1501 (N.D.Ill. 1985) (six employees dismissed).

*Abraham v. Pekacski*, 728 F.2d 107 (3d Cir. 1984) (dismissal of an employee).

*Coffey v. Quinn*, 578 F. Supp. 1464 (N.D. Ill. 1983) (dismissal of one employee).

*Dusanenko v. Maloney*, 560 F. Supp. 822 (S.D.N.Y. 1983) (salary of two employees reduced by 50%).

*Ramsey v. Leath*, 706 F.2d 1166 (11th Cir. 1983) (demotion of two employees).

*Skrocki v. Caltabiano*, 568 F. Supp. 703 (E.D.Pa. 1983) (one employee dismissed).

*Visser v. Magnarelli*, 542 F. Supp. 1331 (N.D.N.Y. 1982) (refusal to rehire one former employee).

*Detz v. Hoover*, 539 F. Supp. 532 (E.D.Pa. 1982) (refusal to reinstate one former employee).

*Goldberg v. Village of Spring Valley*, 538 F. Supp. 641 (S.D.N.Y. 1982) (three employees dismissed).

*Oaks v. City of Fairhope, Ala.*, 515 F. Supp. 1004 (S.D.Ala. 1981) (salary level on one employee).

*German v. Killeen*, 495 F.Supp. 822 (E.D.Mich. 1980) (suspension of one employee).

*Owen v. City of Independence, Mo.*, 421 F.Supp. 1110 (W.D.Mo. 1976) (one dismissed employee).

*McLaughlin v. Tilendis*, 398 F.2d 287 (7th Cir. 1968) (dismissal of one teacher; refusal to rehire another teacher).

*Aitchison v. Raffiani*, 708 F.2d 96 (3d Cir. 1963) (ordinance abolishing the job of one employee held to be "politically motivated ... subterfuge").



## APPENDIX C

**Assertions of Legislative Immunity Regarding  
Action Taken to Discriminate on the Basis of Race**

*Burtnick v. McLean*, 76 F.3d 611 (4th Cir. 1996) (alleged intent to discriminate against white worker).

*Alexander v. Holden*, 66 F.3d 62 (4th Cir. 1995) (commissioner who voted to abolish salary of black Clerk allegedly stated "he did not want a black clerk appointed").

*Chicago Miracle Temple Church v. Fox*, 901 F. Supp. 1333 (N.D.Ill. 1995) (city trustees voted to purchase property allegedly to prevent its acquisition and use by a black church group).

*Smith v. Lomax*, 45 F.3d 402 (11th Cir. 1995) (white clerk replaced by new black clerk, allegedly for racial reasons).

*Rogers v. Mount Union Borough*, 816 F. Supp. 308 (M.D.Pa. 1993) (employee allegedly dismissed because of his race).

*Yeldell v. Cooper Green Hosp.*, 956 F.2d 1056 (11th Cir. 1992) (employees demoted or fired allegedly for racial reasons).

*Calhoun v. St. Bernard Parish*, 937 F.2d 172 (5th Cir. 1991) (permit for low and moderate income housing project denied after police juror allegedly expressed "vitriolic denunciation of minorities).

*Stone's Auto Mart, Inc. v. City St. Paul, Minn.*, 721 F. Supp. 206 (D.Minn. 1989) (rezoning request from black-owned business denied when comparable request from white firm a block away granted).

*Baytree of Inverrary Realty v. City of Lauderhill*, 873 F.2d 1407 (11th Cir. 1989) (single plot of land rezoned to prevent construction of low income housing project allegedly to avoid an influx of black residents).

*Drayton v. Mayor and Council of Rockville*, 699 F. Supp. 1155 (D.Md. 1988) (plaintiffs position allegedly eliminated as a method of discriminating against him because of his race).

*Scott v. Greenville County*, 716 F.2d 1409 (4th Cir. 1983) (denial of building permit for low income apartment allegedly because tenants would include racial minorities).

*German v. Killeen*, 495 F. Supp. 822 (E.D.Mich. 1980) (plaintiff suspend in circumstances in which comparable whites were not suspended).

*Fralin & Waldon, Inc. v. County of Henrico, Va.*, 474 F. Supp. 1315 (E.D.Va. 1979) (plot rezoned to prevent building of proposed low and moderate income housing allegedly because of race of likely residents).

*Curry v. Gillette*, 461 F.2d 1003 (6th Cir. 1972) (city council allegedly gave race-based preferential treatment to white-owned ambulance service).

*Progress Development Corp. v. Mitchell*, 286 F.2d 222, 227 (7th Cir. 1961) (condemnation of site of proposed housing development following "community uproar when it became known that some of the houses that plaintiffs proposed to build would be sold to Negroes and other non Caucasians).

## APPENDIX D

**Assertions of Legislative Immunity  
Regarding Actions Taken to Retaliate Against Individuals  
for the Exercise of Free Speech  
Protected by the First Amendment**

*Carver v. Foerster*, 102 F.3d 96 (3d Cir. 1996) (positions of four county employees abolished after they were allegedly placed on "hit list" for supporting unsuccessful candidate for Proto notary).

*Alexander v. Holden*, 66 F.2d 62 (4th Cir. 1995) (newly elected republican board allegedly for political reasons, abolished salary of Democratic Clerk and then created new position with same responsibilities filled by prominent Republican).

*Arrington v. Dickerson*, 915 F. Supp. 1503 (M.D. Ala. 1995) (denial of liquor license allegedly in retaliation for applicant's questioning of city official).

*Berkely v. Common Council of City of Charleston*, 63 F.3d 295 (4th Cir. 1995) (raises denied to six employees allegedly in retaliation for them to support if unsuccessful mayoral candidate).

*Rabkin v. Dean*, 856 F. Supp. 543 (N.D. Cal. 1994) (denial of salary increase allegedly in retaliation for employee's political associations).

*Ellis v. Coffee County Bd of Registrars*, 981 F.2d 1185 (11th Cir. 1993) (plaintiffs removed from voter roles allegedly in retaliation for their criticisms of county officials).

*Fry v. Bd. of Cty. Com'rs of Baca*, 7 F.3d 936 (10th Cir. 1993) (use of section of government services road denied in alleged retaliation for landowner's opposition to re-election of county commissioners).

*Orange v. County of Suffolk*, 830 F. Supp. 701 (E.D.N.Y. 1993) (employees demoted or fired for refusing to join or contribute to Republican Party).

*Acevedo-Cordero v. Cordero - Santiago*, 958 F.2d 70 (1st Cir. 1992) (purge of members of the New Progressive Party by newly elected Popular Democratic party officials).

*Finch v. City of Vernon*, 877 F.2d 1497 (11th Cir. 1989) (jury verdict that plaintiff's job was abolished in retaliation for his public statements).

*Gross v. Winter*, 876 F.2d 165 (D.C. Cir. 1989) (plaintiff's dismissal allegedly in retaliation for her contacting anti-defamation league of B'nai B'rith).

*O'Brien v. City of Greens Ferry*, 873 F.2d 1115 (8th Cir. 1989) (upholding jury verdict concluding the alderman attempted to force plaintiff to resign in retaliation for her exercise of free speech rights).

*Herbest v. Daukas*, 701 F. Supp. 964 (D.Conn. 1988) (police officer harassed and then demoted allegedly in retaliation for his exposure of pervasive racism in police department).

*Rateree v. Rockett*, 852 F.2d 946 (7th Cir. 1988) (abolition of jobs of four employees in alleged retaliation for their support for unsuccessful candidates for the City Commission).

*Hudson v. Burke*, 617 F. Supp. 1501 (N.D. Ill. 1985) (dismissal of six employees allegedly in retaliation for their support of the political enemies of key alderman).

*Aitchison v. Raffiani*, 708 F.2d 96 (3d Cir. 1983) (ordinance abolishing plaintiff's job held to be a "politically motivated subterfuge" to remove him).



*Coffey v. Quinn*, 578 F. Supp. 1464 (N.D.Ill. 1983) (employee dismissal allegedly in retaliation for his membership in the Fraternal Order of Police).

*Dusanenko v. Maloney*, 560 F. Supp. 822 (S.D.N.Y. 1983) (50% reduction in salary of two Republican officials allegedly partisan retaliation by Democrats).

*Ramsey v. Leath*, 706 F.2d 1166 (11th Cir. 1983) (two employees allegedly demoted because they belonged to a labor organization).

*Reed v. Village of Shorewood*, 704 F.2d 943 (7th Cir. 1983) (denial of liquor licenses to bar allegedly because rock and roll band performed there).

*Goldberg v. Village of Spring Valley*, F. Supp. 641 (S.D.N.Y. 1982) (three dismissed employees allegedly fired for supporting opponent of mayor and village trustees).

*Visser v. Magnarelli*, 542 F. Supp. 1331 (N.D.N.Y. 1982) (finding common council refused to rehire plaintiff because she was a Democrat).

*Thomas v. Younglove*, 545 F.2d 1171 (9th Cir. 1976) (alleged harassment of employees for joining nurses association).

*Oberhelman v. Schultze*, 371 F. Supp. 1089 (D.Minn. 1974) (liquor license allegedly denied because of contents of magazine sold in the store).

*McLaughlin v. Tilendis*, 398 F.2d 287 (7th Cir. 1968) (teacher allegedly dismissed because of his association with the American Federation of Teachers).

## APPENDIX E

### Assertions of Legislative Immunity Regarding Nominally General Ordinance in Fact Directed at Specific Individual or Institution

*Brown v. Crawford County, Ga.*, 960 F.2d 1002 (11th Cir. 1992) (moratorium on mobile home permits in portion of county adopted after more than 100 residents objected to a specific proposed mobile home park).

*Haskell v. Washington Township.*, 864 F.2d 1266 (6th Cir. 1988) (abortion restrictive ordinance adopted shortly after citizens protested opening of proposed abortion clinic, and in wake of efforts by town Board of Trustees to harass clinic owners).

*Invisible Empire Knights of KKK v. City of West Haven*, 660 F. Supp. 1427 (D.Conn. 1985) (ordinance requiring posting of bond for public meetings of more than 25 persons adopted after city had repeatedly thwarted efforts of the KKK to hold a public meeting).

*Kennedy v. Hughes*, 596 F. Supp. 1487, 1490 (D.Del. 1984) (restrictive ordinance regarding tattoo parlors adopted after mayor had threatened newly opened parlor "[T]his kind of business can't be operated in Rehoboth Beach").

*West Side Women's Services v. City of Cleveland*, 573 F. Supp. 504 (N.D. Ohio 1983) (abortion restrictive zoning ordinance adopted to prevent opening of specific proposed clinic).

## APPENDIX F

**Assertions of Legislative Immunity  
Regarding Actions Taken for other Invidious Purposes**

*Burtnick v. McLean*, 76 F. 3d 611 (4th Cir. 1996) (discrimination against Jewish and male employees).

*Reitz v. Persing*, 831 F. Supp. 410 (M.D.Pa. 1993) (ticketing officer dismissed allegedly because he refused requests by mayor and city council members that he not issue tickets to their friends).

*Freeman v. McKeller*, 795 F. Supp. 733 (E.D.Pa. 1992) (plaintiff allegedly fired because he rejected services of attorney hired by and then gave grand jury testimony against city council members who was subsequently indicted).

*Baker v. Mayor and City Council of Baltimore*, 849 F.2d 679 (4th Cir. 1990) (age discrimination in violation of Age Discrimination of Employment Act).

*Bryant v. Nichols*, 712 F. Supp. 887 (M.D.Ala. 1989) (employee demoted allegedly in retaliation for her earlier successful lawsuit against the city).

*Haskell v. Washington Township*, 864 F.2d 1266, 1270 (6th Cir. 1988) (adoption of anti-abortion zoning ordinance despite unanimous legal advice that it was unconstitutional).

*Pendleton Const Co. V. Rockbridge County*, 652 F. Supp. 312 (W.D. Va. 1987) (denial of permits to competitors allegedly to assure that certain business went to firm favored by Board of Supervisors).

*Healy v. Town of Pembroke*, 831 F.2d 989 (11th Cir. 1987) (city decision to abolish jobs of four police officers found to have been made to retaliate against police union for filing grievances).

*Ditch v. Bd of County Commr's of County of Shawnee*, 650 F. Supp. 1245 (D. Kan. 1986) (plaintiffs job abolished allegedly for purpose of discriminating on the basis of age).

*Kuchka v. Kile*, 634 F. Supp. 502 (M.D.Pa. 1985) (dismissed employee allegedly fired for providing legal representation fired for providing legal representation in suit against county commissioners).

*Abraham v. Pekarski*, 728 F.2d 167 (3d Cir. 1984) (plaintiff successfully contended he was fired for refusing to deny municipal services to wards represented by members of minority faction of Township Board).

*Affiliated Capital Corp v. City of Houston*, 735 F. 2d 1555 (5th Cir. 1984) (upholding finding that cable franchise was illicitly awarded to applicant to repay a personal debt of the mayor).

*Cinevision Corp v. City of Burbank*, 74 F.2d 560, 576, n. 20, 578 n 25 (9th Cir. 1984) (permission to hold "hard rock" concerts in public forum denied after City Council member objected they would attract homosexuals).

*Cutting v. Muzzey*, 724 F.2d 259 (1st Cir. 1984) (burdensome conditions allegedly imposed on proposed subdivision because likely purchases of homes would be Italian).

*Espanola Way Corp. V. Meyerson*, 690 F.2d 827 (11th Cir. 1982) (hotels allegedly harassed because residents were Cuban refugees).

*Oaks v. City of Fairhope, Ala.*, 515 F. Supp. 1004 (S.D.Ala. 1981) (employee allegedly given a lower salary because of her sex).



## APPENDIX G

**Assertions of Legislative Immunity Regarding Decisions  
Concerning Use of One Plot of Land**

*Abierto v. City of Chicago*, 949 F. Supp. 637 (N.D.Ill. 1996)  
(rezone single plot of land to preclude proposed use as a church).

*Corn v. City of Lauderdale Lakes*, 997 F.2d 1369 (11th Cir. 1993)  
(plaintiff's land rezoned to ban proposed construction project;  
builder's site plan disapproved).

*Triomphe Investors v. City of Northwood*, 835 F. Supp. 1036  
(N.D. Ohio 1993) (denial of special use permit to build a condo  
minimum).

*Calhoun v. St. Bernard Parish*, 937 F.2d 172 (5th Cir. 1991) (in  
response to request for permit to build low and moderate income  
housing, police jury issues permit limited to housing for the  
elderly).

*Crymes v. Dekalb County, Ga.*, 923 F.2d 1482 (11th Cir. 1991)  
(denial of permit to allow specific property to be used as a  
landfill).

*Baytree of Inverrary Realty v. City of Lauderhill*, 873 F.2d 1407  
(11th Cir. 1989) (rezoning of a single plot of land to forbid  
construction of low cost housing project).

*Stone's Auto Mart, Inc., v. City of St. Paul, Minn.*, 721 F. Supp.  
206 (D.Minn. 1989) (denial of request to rezone one plot).

*Bateson v. Geisse*, 857 F.2d 1300 (9th Cir. 1988) (denial of a  
single building permit).

*Bolton v. Marple Township*, 689 F. Supp. 477 (E.D.Pa. 1988)  
(refusal to consider request for zoning variance).

*Creekside Associates, Inc. v. City of Wood Dale*, 684 F. Supp. 201  
(N.D.Ill. 1988) (rejection of builder's development plan).

*Dunmore v. City of Natchez*, 703 F. Supp. 31 (S.D.Miss. 1988)  
(denial of zoning variance).

*Epstein v. Township of Whitehall*, 693 F. Supp. 309 (E.D.Pa. 1988)  
(refusal to approval of developer's construction plan).

*New Port Largo, Inc. v. Monroe County*, 706 F. Supp. 1507  
(S.D.Fla. 1988) (rezone plaintiffs land to prevent proposed  
development).

*Carroll V. City of Prattville*, 653 F. Supp. 933 (M.D.Ala. 1987)  
(plaintiffs land rezoned in a manner that precluded proposed  
development plans).

*Jodeco, Inc. v. Hann*, 674 F. Supp. 488 (D.N.J. 1987) (denial of  
zoning variance).

*Mears v. Town of Oxford, Md.*, 762 F.2d 368 (4th Cir. 1985)  
(ordinance adopted to forbid the building of 25 boat slips by a  
specific marina).

*Racetrack Petroleum, Inc. v. Prince George's County*, 601 F.  
Supp. 892 (D.Md. 1985) (denial of zoning variance).

*Cutting v. Muzzey*, 724 F.2d 259 (1st Cir. 1984) (imposition of  
special burdensome requirements on specific proposed  
subdivision).

*LaSalle Nat. Bank v. County of Lake*, 579 F. Supp. 8 (N.D.Ill.  
1984) (denial of sewer service to be specific landowner).

*Nemmers v. City of Dubuque, Iowa*, 716 F.2d 1194 (8th Cir. 1983)  
(rezoning a single plot of land).

*Scott v. Greenville County*, 716 F.2d 1409 (4th Cir. 1983) (denial of building permit for low-income apartment project).

*Altare Builders, Inc. v. Village of Horseheads*, 551 F. Supp. 1066 (W.D.N.Y. 1982) (delay in issuing building permit).

*Espanola Way Corp. v. Meyerson*, 690 F.2d 827 (11th Cir. 1982) (harassment of specific hotels which housed Cuban refugees).

*Kuzinich v. County of Santa Clara*, 689 F.2d 1345 (9th Cir. 1982) (rezoning of two specific locations to forbid continued operation of existing adult movie theater and adult book store).

*Bledgett v. County of Santa Cruz*, 553 F. Supp. 1090 (N.D.Cal. 1981) (denial of application to subdivide property).

*Hernandez v. City of Lafayette*, 643 F.2d 1188 (5th Cir. 1981) (refusal to grant request to rezone a single plot of land, admittedly made to keep down value of land in anticipation of condemnation).

*Tolbeit v. County of Nelson*, 527 F. Supp. 836 (W.D.Va. 1981) (rezoning of a single plot of land).

*Bruce v. Riddle*, 631 F.2d 272 (4th Cir. 1980) (single plot of land rezoned to prevent building of HUD sponsored multi-family dwelling).

*Fralin & Waldron, Inc. v. County of Henrico, Virginia*, 474 F. Supp. 1315 (E.D.Va. 1979) (plot rezoned to prevent building of low and moderate income housing).

*Ligon v. State of Maryland*, 448 F. Supp. 935 (D.Md. 1977) (rezoning of two parcels of land).

*Shellburne, Inc. v. New Castle County*, 293 F. Supp. 237 (D.Del. 1968) (one plot of land rezoned).

## APPENDIX H

### Assertions of Legislative Immunity Regarding Specific Licenses Permit

*Bennett v. City of Slidell*, 697 F.2d 657, 660 (5th Cir. 1983) (denial of plaintiff's request for a liquor license).

*Reed v. Village of Shorewood*, 704 F.3d 943 (7th Cir. 1983) (denial of liquor license to a single bar).

*Richardson v. Town of Eastover*, 922 F.2d 1152 (4th Cir. 1991) (revocation of business licenses of two night clubs).

*Arrington v. Dickerson*, 915 F. Supp. 1503 (M.D.Ala. 1995) (denial of liquor license).

*B Street Commons v. Board of County Com'rs*, 835 F. Supp. 1266 (D.Colo. 1993) (denial of special use permit for particular business).

*Foerst v. Banko*, 662 F. Supp. 257 (E.D.Pa. 1984) (denial of use and occupancy permit).

*Ka-Haar, Inc. v. Huck*, 345 F. Supp. 54 (E.D.Wisc. 1972) (revocation of liquor license).

*Kinderhill Farm Breeding Associates v. Appel*, 450 F. Supp. 134 (S.D.N.Y. 1978) (denial of license to operate a mobile home).

*Mirshak v. Joyce*, 652 F. Supp. 359 (N.D.Ill. 1987) (delay in issuance of a liquor license).

*Oberhelman v. Schultze*, 371 F. Supp. 1089 (D.Minn. 1974) (denial of a liquor license).

*Parine v. Levine*, 274 F. Supp. 268 (E.D.Mich. 1967) (refusal to permit transfer of liquor license).



*Pendleton Coast Corp. v. Rockbridge County, Va.*, 652 F. Supp. 312  
(W.D.Va. 1987) (denial of permits to operate rock quarries).

9

No. 96-1569

Supreme Court, U.S.  
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In The  
**Supreme Court of the United States**

October Term, 1997

DANIEL BOGAN AND MARILYN RODERICK,

*Petitioners,*

vs.

JANET SCOTT-HARRIS,

*Respondent.*

On Writ Of Certiorari  
To The United States Court Of Appeals  
For The First Circuit

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2388



## TABLE OF CONTENTS

	Page
Table of Authorities .....	ii
Introduction .....	1
Argument .....	1
I. Local Legislators Are Entitled To Absolute Immunity From Liability Under 42 U.S.C. § 1983 For Actions Taken In A Legislative Capacity .....	1
A. At The Time § 1983 Was Enacted, Local Legislators Enjoyed Absolute Immunity For Discretionary Acts Taken In A Legislative Capacity .....	1
B. Nothing In § 1983's History Or Purposes Counsels Against Absolute Immunity From § 1983 Liability for Local Legislators .....	5
C. Denying Local Legislators Absolute Immunity Would Require This Court To Overrule <i>Lake Country Estates</i> .....	13
II. Legislators Act In Their Legislative Capacity When They Propose Or Vote On Municipal Legislation .....	14
III. Absent A Finding That Challenged Legislation Is Unlawful, Individual Legislators Cannot Be The Proximate Cause Of Any Actionable Injury To A Plaintiff .....	17
Conclusion .....	20

## TABLE OF AUTHORITIES

	Page
CASES	
<i>Aitchison v. Raffiani</i> , 708 F.2d 96 (CA3 1985).....	13
<i>Amy v. The Supervisors</i> , 11 Wall. (78 U.S.) 136 (1871).....	2, 3, 4
<i>Baker v. The State</i> , 27 Ind. 485 (1867).....	5
<i>Barr v. Matteo</i> , 360 U.S. 564 (1959).....	9, 11
<i>Bradley v. Heath</i> , 12 Pick. (29 Mass.) 164 (1831).....	4
<i>Buckley v. Fitzsimmons</i> , 509 U.S. 259 (1993).....	6
<i>Butz v. Economou</i> , 438 U.S. 478 (1978).....	11, 15
<i>Caswell v. Allen</i> , 7 Johns. 63 (N.Y. 1810).....	2
<i>Easton v. Calendar</i> , 11 Wend. 90 (N.Y. 1833).....	4
<i>Eastland v. United States Servicemen's Fund</i> , 421 U.S. 491 (1975).....	7
<i>Farr v. Thompson</i> , 11 Wall. (78 U.S.) 139 (1871).....	2
<i>Forrester v. White</i> , 484 U.S. 219 (1988).....	6, 11, 17
<i>Gorman Towers v. Bogoslavsky</i> , 626 F.2d 607 (CA8 1980).....	7
<i>Greenwood v. Corbey</i> , 26 Neb. 449 (1889).....	4
<i>Gregoire v. Biddle</i> , 177 F.2d 579 (CA2 1949).....	3, 9
<i>Harlow v. Fitzgerald</i> , 457 U.S. 800 (1982).....	12, 13
<i>Hilton v. South Carolina Public Railways Commis- sion</i> , 502 U.S. 197 (1991).....	13
<i>Lake Country Estates v. Tahoe Regional Planning Agency</i> , 440 U.S. 391 (1979).....	6, 7, 11, 13, 14

## TABLE OF AUTHORITIES - Continued

	Page
<i>Malley v. Briggs</i> , 475 U.S. 335 (1986).....	18
<i>McGaw v. Hamilton</i> , 184 Pa. 108 (1898).....	4
<i>Morris v. The People</i> , 3 Denio 381 (N.Y. 1846).....	2
<i>Owen v. City of Independence</i> , 445 U.S. 622 (1980).....	8
<i>Rateree v. Rockett</i> , 852 F.2d 946 (CA7 1988).....	7
<i>Smith v. Higgins</i> , 16 Gray (82 Mass.) 251 (1860).....	4
<i>Spallone v. United States</i> , 493 U.S. 265 (1990).....	2, 8
<i>Supreme Court of Virginia v. Consumers Union</i> , 446 U.S. 719 (1980).....	7, 16
<i>Tenney v. Brandhove</i> , 341 U.S. 367 (1951) .....	3, 11, 14, 15, 16, 17
<i>Vail v. Owen</i> , 19 Barb. 22 (N.Y. 1854).....	4
<i>White v. Nicholls</i> , 44 U.S. 266 (1845).....	4
<i>Wilson v. New York</i> , 1 Denio 595 (N.Y. 1845).....	5
<i>Wood v. Strickland</i> , 420 U.S. 308 (1975).....	14
STATUTES AND RULES	
18 U.S.C. § 242.....	8
42 U.S.C. § 1983.....	passim
TREATISES, LAW REVIEW ARTICLES AND OTHER SOURCES	
<i>Black's Law Dictionary</i> (6th ed. 1990).....	2
Note, <i>Developments in the Law - Section 1983 and Federalism</i> , 90 Harv. L. Rev. 1133 (1977).....	14
U.S. Bureau of the Census, <i>Statistical Abstract of the United States: 1996</i> (116th ed. 1996).....	10



## INTRODUCTION

The Brief of Respondent Scott-Harris ("Scott-Harris") is notable for what it does *not* say: it does not take issue with *any* of the critical points made in the Individual Defendants' opening Brief. Scott-Harris does not deny that nineteenth century common law gave municipal legislators absolute immunity for the sorts of discretionary acts that are at issue here. Although she insists that absolute immunity for local legislators is unnecessary, she does not deny that the policies that support absolute immunity for state and regional legislators are fully applicable here. She also does not deny that state legislators or members of Congress act in a legislative capacity when they pass laws that in relevant respects are identical to the ordinance that eliminated her position. And she does not deny that the First Circuit's approach would largely abrogate immunity for local legislators by requiring, in virtually every case, a trial on the merits *before* entitlement to immunity is determined. In short, Scott-Harris has not offered any persuasive defense of the decision below.

## ARGUMENT

### **I. LOCAL LEGISLATORS ARE ENTITLED TO ABSOLUTE IMMUNITY FROM LIABILITY UNDER 42 U.S.C. § 1983 FOR ACTIONS TAKEN IN A LEGISLATIVE CAPACITY.**

#### **A. At The Time § 1983 Was Enacted, Local Legislators Enjoyed Absolute Immunity For Discretionary Acts Taken In A Legislative Capacity.**

Scott-Harris makes no real attempt to argue that local legislators did not enjoy common law absolute immunity at the time of § 1983's enactment for the kinds of discretionary acts at issue here. Instead, she argues that: (1) legislators were not immune from liability for purely "ministerial" acts; and (2) a review of slander actions against local legislators reveals that they only enjoyed a qualified immunity from suit. Resp't Br. at 15-20. The first point is irrelevant; the second, incorrect.

A "ministerial" act is one which involves "obedience to instructions" and "demands no special discretion, judgment or skill." See *Black's Law Dictionary* 996 (6th ed. 1990). Courts have allowed suits against legislators only in those rare cases where their challenged actions were of such a purely mandatory, "ministerial" nature. See *Amy v. The Supervisors*, 11 Wall. (78 U.S.) 136, 138 (1871) (finding liability where plaintiff had successfully obtained a judgment against the county and the individual legislators then defied a court order to levy a tax to raise the money necessary to pay the judgment; the Court stated that liability could be imposed where, as under these facts, "the law requires absolutely a ministerial act to be done by a public officer, and he neglects or refuses to do such act"); *Farr v. Thompson*, 11 Wall. (78 U.S.) 139 (1871) (same); *Caswell v. Allen*, 7 Johns. 63, 66, 68 (N.Y. 1810) (individual legislators could be found liable where a statute requiring them to levy a tax was "mandatory, and obliged them to do it without delay. . . . No discretion appears to have been given to the supervisors"); *Morris v. The People*, 3 Denio 381 (N.Y. 1846) (law required legislators to pay judge's salary).

Implicit in this line of cases is the recognition that ministerial actions, because they do not involve discretion or judgment, are not traditional "legislative" acts for purposes of immunity analysis. This point is illustrated by the 20th century counterpart to *Amy*, *Spallone v. United States*, 493 U.S. 265 (1990).

In *Spallone*, the Court removed contempt sanctions which had been imposed on four city councilmembers for refusing to pass legislation implementing a consent decree. The majority in *Spallone* reasoned that sanctions against the city should have been tested before the question of imposing sanctions against the individual councilmembers should "even have been considered." *Spallone*, 493 U.S. at 280. What is of particular significance here is the dissenting opinion, authored by Justice Brennan and joined in by three other Justices. Justice Brennan first emphasized the compelling reasons underlying the doctrine of legislative immunity and specifically stated – in this action involving city councilmembers – that, with respect to traditional legislative actions, "[t]o encourage legislators best

to represent their constituents' interests, legislators must be afforded immunity from private suit." *Id.* at 300 (Brennan, J., dissenting). He went on to find the contempt sanctions nevertheless supportable only because, in his view, "once a federal court has issued a valid order to remedy the effects of a prior, specific constitutional violation, the representatives are no longer acting in a field where legislators traditionally have power to act." *Id.* at 301 (quoting *Tenney v. Brandhove*, 341 U.S. 367, 379 (1951)) (emphasis added).

Nor is it the case that every legislative action which is subsequently found unconstitutional becomes, *ex post*, "ministerial" because a legislator does not have "discretion" to violate the Constitution. See Resp't Br. at 23, n.32. A ministerial act is one concerning which there is no discretion *ab initio*, when the matter is first presented to the legislator; it does not encompass matters where the legislator possessed discretion but exercised that discretion incorrectly. A contrary view would result in the abolition of any immunity for legislators whatsoever in § 1983 actions, as Scott-Harris herself concedes. *Id.* at 23-24, n.32.<sup>1</sup> See, e.g., *Gregoire v. Biddle*, 177 F.2d 579, 581 (CA2 1949) (Learned Hand, J.):

The decisions have, indeed, always imposed as a limitation upon the immunity that the official's act must have been within the scope of his powers; and it can be argued that official powers, since they exist only for the public good, never cover occasions where the public good is not their aim, and hence that to exercise a power dishonestly is necessarily to overstep its bounds. A moment's reflection shows, however, that that cannot be the meaning of the limitation without defeating the whole doctrine [of immunity].

<sup>1</sup> Because "[a] mistake as to his duty and honest intentions will not excuse the offender" who fails to carry out a ministerial function, *Amy v. The Supervisors*, 11 Wall. (78 U.S.) at 138, under Scott-Harris' view the "discretionary-ministerial doctrine" would seemingly also result in strict liability for legislators charged with constitutional violations.



The Individual Defendants' challenged actions in the instant case were plainly discretionary, not "ministerial." No specific court order or statute required the City of Fall River to continue the Department of Health and Human Services or Scott-Harris' position within it. Instead, the decision to eliminate the Department was a quintessential discretionary, legislative act, reflecting one of a number of steps open to the City with respect to its perceived budgetary needs for the upcoming fiscal year. *Amy* and the narrow line of cases like it are not remotely applicable here.

A review of the nineteenth century slander decisions cited by Scott-Harris similarly fails to demonstrate that legislators did not possess absolute immunity for discretionary acts taken in a legislative capacity. Instead, this case law shows that courts allowed slander actions only against legislators who were not acting in a legislative capacity, or against private citizens who were speaking in some public forum. See, e.g., *Bradley v. Heath*, 12 Pick. (29 Mass.) 164, 165 (1831) (defendant selectman's alleged slander made in the course of overseeing the proper conduct of a town election); *White v. Nicholls*, 44 U.S. 266 (1845) (defendants were private citizens who allegedly libeled a public officer in a letter to the President); *Smith v. Higgins*, 16 Gray (82 Mass.) 251 (1860) (defendants were private citizens whose alleged slander was made in the course of a town meeting); *McGaw v. Hamilton*, 184 Pa. 108 (1898) (legislator's alleged slander found by jury to have been made outside the course of debate in a legislative body).<sup>2</sup>

<sup>2</sup> The other authority cited by Scott-Harris is equally unpersuasive. In *Vail v. Owen*, 19 Barb. 22, 29 (N.Y. 1854), the defendants were tax assessors sued for an allegedly improper assessment; the court held that the challenged action was "a judicial act" and found them immune from suit. In *Easton v. Calendar*, 11 Wend. 90, 93 (N.Y. 1833), the defendants were school district trustees responsible for preparing a tax list; the court similarly described the job of apportioning the tax as "in my opinion, to a certain extent, in the nature of a judicial act." In *Greenwood v. Corbey*, 26 Neb. 449 (1889), a post-1871 decision, the individual defendant was a city mayor who criticized the city attorney at a public meeting of the city council. The court appears to have been unable to determine how to

In sum, it is clear that the widely held view at the time of § 1983's enactment was that local legislators were absolutely immune from suit for discretionary actions taken in a legislative capacity. See Pet. Br. at 23-25; Brief of *Amicus Curiae* National League of Cities, *et al.* at 10-15 [hereinafter "Nat. League Br."].

#### **B. Nothing In § 1983's History Or Purposes Counsels Against Absolute Immunity From § 1983 Liability For Local Legislators.**

Scott-Harris does not dispute that the only legislative history on point is supportive of absolute legislative immunity.

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characterize the mayor's action, as it (a) cited as the "leading case in this country on the subject of privileged communications" an action involving the privilege applicable to *private citizens* who presented a petition to their county council, (b) discussed the mayor's *executive* responsibilities, noting that he possessed by statute "superintending control of all the officers and offices of the city," and (c) found an "absence of authorities in cases like that under consideration" – notwithstanding the relative wealth of legislative immunity cases and treatises discussing them which then existed. *Id.* at 452, 455, 456.

Of the cases cited by Scott-Harris, it therefore appears that only one, *Baker v. The State*, 27 Ind. 485, 489 (1867), arguably held that individual legislators could be liable if "they acted corruptly" at the time of § 1983's enactment. Even in this single instance, however, it is unclear precisely what the court meant by this qualification. In one of the most ringing proclamations of absolute immunity for local legislators, *Wilson v. New York*, 1 Denio 595, 599-600 (N.Y. 1845), for example, the court similarly noted that certain steps could be taken if a legislator acted "corruptly," but carefully limited those steps as follows:

The civil remedy for misconduct in office is more restricted and depends exclusively upon the nature of the duty which has been violated. . . . If corrupt, [the legislator] may be impeached or indicted, but the law will not tolerate an action to redress the individual wrong which may have been done. These principles are too familiar and well settled to require illustration or authority, and in my view of the present question they govern and control it.

See Nat. League Br. at 15-16. Her arguments that the considerations which impelled this Court to recognize absolute immunity for state and regional legislators are not present with respect to local legislators are unpersuasive.

This Court follows a well-established "functional" test in determining whether the purposes behind immunity from § 1983 liability for government representatives are present. See, e.g., *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993); *Forrester v. White*, 484 U.S. 219 (1988). The Court followed this approach in *Lake Country Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979), where it determined that the functions which regional legislators perform are comparable to those of legislators at other levels of government. Given the similarity of function, the Court concluded that the rationale behind the provision of absolute immunity "is equally applicable to federal, state and regional legislators." *Id.* at 405.

Significantly, Scott-Harris does not – and cannot – argue that the legislative functions performed by the Individual Defendants are different from such functions at the federal, state, or regional level. Instead, she eschews a functional analysis altogether and attempts to argue that a variety of policy reasons, unrelated to function, militate against absolute immunity. As she notes, however, resort to such freewheeling "policymaking" considerations has come under increasing criticism by this Court. See Resp't Br. at 26, n.36 and cases cited therein. Nowhere does she attempt to articulate a policy argument against absolute immunity which would not apply with equal, if not greater, force at the federal, state, and regional levels. Her policy arguments lack merit at the local level as well. Specifically:

1. A rule of qualified immunity for local legislators is as inadequate to serve the compelling interests of absolute immunity at the local level as it is at the federal, state, and regional levels. The evils of diverting legislators from their public duties, disturbing the decision making process, and deterring qualified individuals from seeking public office are all equally present at the local level as at the federal, state, and regional levels. Indeed, the proximity of local legislators to their constituents makes the potential perils still more pressing and the

corresponding need for absolute immunity all the more compelling. See, e.g., *Gorman Towers v. Bogoslavsky*, 626 F.2d 607, 612 (CA8 1980). If, as Scott-Harris contends, qualified immunity is sufficient to address these concerns, this would logically compel the wholesale abolition of absolute immunity at the state and regional levels of government as well.

2. The possibility that local legislators may be indemnified if they are found to have violated § 1983, following full discovery and trial, hardly supports the view that absolute immunity is unnecessary. They will still be forced to "divert their time, energy, and attention from their legislative tasks to defend the litigation." See *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 733 (1980) (quoting *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 503 (1975)). The purchase of private insurance is an equally feeble palliative.<sup>3</sup>

3. Effective remedies against abuse are fully available at the local level. First, one can sue the city or municipal entity for injunctive relief and damages – the latter constituting an alternative which does not even exist at the state level. See *Lake Country Estates*, 440 U.S. at 405 n.29 ("If the respondents have enacted unconstitutional legislation, there is no reason why relief against TRPA itself should not adequately vindicate petitioners' interests.") (citation omitted).<sup>4</sup> Willful

<sup>3</sup> Scott-Harris seeks to prove too much if she argues that indemnification and/or insurance can in fact remove all fear of ultimate personal liability and the diversion of time and energy which invariably accompanies litigation. If indemnification or insurance could have this effect, legislators would be just as free to engage in abuses as Scott-Harris asserts is the case under a rule of absolute immunity.

<sup>4</sup> Scott-Harris' contention that the availability of a suit against the municipal entity is meaningless because she could not prove her case against the City of Fall River lacks all merit. As the First Circuit Court of Appeals noted, Scott-Harris made almost no effort to establish her case against the City. App. to Pet. for Cert. at 61-63. It does not follow from this that, because it is "much simpler" to do so, she should be able to single out individual legislators as defendants and hold them personally liable for legislation which she cannot prove is unlawful. Resp't Br. at 35. See also *Rateree v. Rockett*, 852 F.2d 946, 951 n.3 (CA7 1988) (upholding absolute



deprivations of constitutional rights by individual legislators acting under color of state law also remain criminally punishable under 18 U.S.C. § 242. Second, the absence of any immunity for city governments not only provides an effective remedy for wronged individuals; it also provides an additional check on unlawful behavior by municipal legislators. See *Spallone*, 493 U.S. at 280 (noting that the prospect of a "bankrupting fine" against the municipal entity would likely influence the actions of individual city councilmembers); *Owen v. City of Independence*, 445 U.S. 622, 651-652 (1980). In many, if not most, municipalities today, even a single large judgment can have a direct effect upon the municipality's ability to fund the most fundamental public services – schools, police, parks, and roads. Third, resort to the ballot box is a far more effective check on abuse at the local level than it is at the state or federal level. Even a substantial judgment will have little, if any, direct impact upon most voters at the national or state level (where only injunctive relief is available in any event). In contrast, as noted, a local legislator's role in passing unlawful legislation will likely have a direct and immediate effect upon his or her constituents' daily lives, and hence on their voting propensities. Further, it is almost axiomatic that each vote at the local level carries more weight than it does at the state or federal level, where the sheer numbers involved make the possible impact of any one bloc of voters far less significant.

4. Absolute immunity for local legislators has not caused and will not cause rampant lawlessness. All of the checks noted above are present to safeguard against abuse; in particular, none of the extraordinary hypothetical statutes enumerated by Scott-Harris at pages 40-41 of her Brief could withstand immediate challenge in actions brought directly against the municipality which enacted them. In addition, all would

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immunity for local legislators who had voted to eliminate the plaintiffs' positions and observing that "the plaintiffs in this case did succeed in a lawsuit against the city of Harvey and recovered damages. This, at least, demonstrates the availability of other relief.").

unquestionably be viewed as legislative if enacted at the federal, state, or regional levels. Absolute legislative immunity is, of course, well established at these other levels of government, with no apparent catastrophic effect.<sup>5</sup> Indeed, absolute immunity exists with respect to a host of other government officials – judges, prosecutors, and members of the executive branch of government. Our system of government has not toppled. There is no reason to believe that municipal legislators, as a group or individually, are more dramatically inclined to corruption or abuse than any of these other members of our various branches of government.<sup>6</sup>

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<sup>5</sup> No one can deny that absolute immunity, wherever it is deemed applicable, may very occasionally permit individual "scoundrels" to escape legal liability. Such a result is deemed warranted, not because of any public interest in protecting such individuals, but because it is necessary to serve a far greater public good. As Judge Learned Hand observed in *Gregoire v. Biddle*, 177 F.2d 579, 581 (CA2 1949):

It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith.

<sup>6</sup> This Court has already considered and rejected precisely the same kind of "rampant lawlessness" argument with respect to absolute immunity which Scott-Harris seeks to make here in *Barr v. Matteo*, 360 U.S. 564, 576 (1959) (Harlan, J.):

We are told that we should forebear from sanctioning any such rule of absolute privilege lest it open the door to

5. Scott-Harris' contention that local legislation necessarily affects fewer people than state or federal legislation is simply untrue. Federal legislation often focuses on small numbers of individuals. *See* Nat. League Br. at 26 n. 11 (tax legislation contained 79 separate provisions affecting 100 or fewer people). The local governments of our three largest cities each enact legislation affecting more people than do twenty of our state governments.<sup>7</sup> Further, the number of people affected by a particular governmental actor's decision has never been the test of whether immunity should attach. Absolute immunity for judges and prosecutors is of course long established; the

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wholesale oppression and abuses on the part of unscrupulous government officials. It is perhaps enough to say that fears of this sort have not been realized within the wide area of government where a judicially formulated absolute privilege of broad scope has long existed. It seems to us wholly chimerical to suggest that what hangs in the balance here is the maintenance of high standards of conduct among those in the public service. To be sure, as with any rule of law which attempts to reconcile fundamentally antagonistic social policies, there may be occasional instances of actual injustice which will go unredressed, but we think that price is a necessary one to pay for the greater good. And there are of course other sanctions than civil tort suits available to deter the executive official who may be prone to exercise his functions in an unworthy and irresponsible manner. We think that we should not be deterred from establishing the rule which we announce today by any such remote forebodings.

<sup>7</sup> The three largest cities are New York (7,333,000), Los Angeles (3,449,000), and Chicago (2,732,000). U.S. Bureau of the Census, *Statistical Abstract of the United States: 1996* 44-46 (116th ed. 1996). The twenty smallest states, in descending order of size, are Mississippi (2,697,000), Kansas (2,565,000), Arizona (2,484,000), Utah (1,951,000), West Virginia (1,828,000), New Mexico (1,685,000), Nebraska (1,637,000), Nevada (1,530,000), Maine (1,241,000), Hawaii (1,187,000), Idaho (1,163,000), New Hampshire (1,148,000), Rhode Island (990,000), Montana (870,000), South Dakota (729,000), Delaware (717,000), North Dakota (641,000), Alaska (604,000), Vermont (585,000), and Wyoming (480,000). *Id.* at 29-30.

great majority of these protected judicial and prosecutorial functions affect only single individuals or small group of individuals. *See, e.g., Tenney v. Brandhove*, 341 U.S. 367 (1951) (state legislative action affecting single individual held entitled to absolute immunity); *Barr v. Mateo*, 360 U.S. 564 (1959) (executive department action affecting two individuals held entitled to absolute immunity).

6. A workable rule with respect to when absolute immunity applies is no more difficult to demarcate with respect to local legislators than it is with respect to any other governmental function to which immunity attaches. Again, the Court's well-settled focus is on the nature of the function performed, not the identity of the actor or the level of government at which he or she performs the function. *See Forrester v. White*, 484 U.S. 219 (1988); *Butz v. Economou*, 438 U.S. 478 (1978). The analysis for local legislators is precisely the same as it was in *Lake Country Estates* for regional ones: "to the extent the evidence discloses that these individuals were acting in a capacity comparable to that of members of a state legislature, they are entitled to absolute immunity from federal damages liability." 440 U.S. at 406. Further, courts are required to draw similar lines with respect to every position which enjoys any form of immunity, at every level of government – judges, prosecutors, legislators, and executive branch members. Simply because line drawing in certain cases may prove difficult does not mean there should be no line at all. *See Forrester*, 484 U.S. at 227 ("This Court has never undertaken to articulate a precise and general definition of the class of acts entitled to immunity."). Scott-Harris also fails to note that such line drawing will be necessary in any event, regardless of the level of immunity which applies.<sup>8</sup>

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<sup>8</sup> The difficulty of distinguishing between "legislative" and "administrative" acts noted by Scott-Harris exists principally where, as under the First Circuit's approach, courts look beyond the issue of whether a legislative function was involved to inquire into the motivation *behind* the legislation. This difficulty is avoided altogether when the inquiry is



The critical point is that no difficult line drawing is required in the instant case. The Individual Defendants' challenged actions involved classic legislative activity: the submission of a proposed ordinance to eliminate a city department to an elected city council and the ordinance's subsequent passage into law. No process could be as recognizably a part of our history and tradition of representative government.

7. Finally, Scott-Harris never pauses to address the evils which would follow adoption of a rule denying local legislators the same form of absolute immunity that legislators at every other level of government enjoy. Yet all of the concerns which have made absolute immunity a cornerstone of our system of government, with roots ultimately extending back to sixteenth and seventeenth century England, apply with equal force at the local level. These concerns – revolving principally around the inevitable distraction of litigation, the distortion of the decision making process which accompanies it, and the deterrent impact on qualified individuals seeking to hold office – are based upon the need for a free, resolute, and effective legislature. This need is as compelling at the local level of government as at its federal, state, and regional counterparts.<sup>9</sup> Approaches such as

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properly limited to a determination of whether the individual defendant was acting in a legislative capacity. See discussion at pages 14-15, *infra*.

<sup>9</sup> If this Court should find that the Individual Defendants are not entitled to absolute immunity, the action should be remanded for reconsideration based upon the Individual Defendants' entitlement to a qualified immunity defense. Even Scott-Harris concedes that qualified immunity should be available to local legislators if absolute immunity is deemed inapplicable. See Resp't Br. at 24-25. Under the approach enunciated in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the district court should determine, as a threshold question, whether an official's alleged misconduct violated law that was "clearly established at the time [the] action occurred." *Id.* at 818. The availability of the qualified immunity defense was not addressed at any point in the proceedings below because, under controlling First Circuit law (as well as the law in every other Circuit to consider the question), the Individual Defendants could avail themselves of an absolute immunity defense for their legislative acts. See App. to Pet. for Cert. at 64; Pet. Br. at 20-21. However, as the First Circuit noted in the

that suggested by Scott-Harris and the First Circuit ignore these concerns, and in fact compound them by threatening to fling wide the courthouse doors to all citizens suspicious of individual legislators' motives.

### C. Denying Local Legislators Absolute Immunity Would Require This Court To Overrule *Lake Country Estates*.

No meaningful distinction can be drawn between the regional legislators found absolutely immune from § 1983 liability in *Lake Country Estates* and the local legislators before the Court in this case – certainly none which would militate against a finding of absolute immunity for the Individual Defendants.<sup>10</sup> As Justice Marshall noted in his dissenting opinion in *Lake Country Estates*:

[T]he majority's reasoning in this case leaves little room to argue that municipal legislators stand on a different footing than their regional counterparts. Surely the Court's supposition that the "cost and inconvenience and distractions of a trial" will impede officials in the "uninhibited discharge of their legislative duty" applies with equal force whether the officials occupy local or regional positions.

440 U.S. at 407-408 (Marshall, J., dissenting) (citations omitted).

Denying local legislators absolute immunity would, therefore, require this Court to overrule *Lake Country Estates*. This Court has, of course, repeatedly announced its profound antipathy to such a reversal of precedent. See, e.g., *Hilton v. South*

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instant case, "one could argue that Scott-Harris' comments about, and efforts to discipline, a particular employee do not qualify as speech on a matter of public concern." App. to Pet. for Cert. at 54. The logical conclusion to be drawn from this is that the Individual Defendants' conduct "[did] not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818.

<sup>10</sup> The only real distinction between the two groups is that the regional legislators in *Lake Country Estates* were appointed, whereas the two Individual Defendants were elected. This case thus presents an even stronger argument for absolute immunity than was present in *Lake Country*. See *Aitchison v. Raffiani*, 708 F.2d 96, 98 (CA3 1985).

*Carolina Public Railways Commission*, 502 U.S. 197, 202 (1991) (“[W]e will not depart from the doctrine of *stare decisis* without some compelling justification.”) (citations omitted). No such compelling justification exists in this case.<sup>11</sup>

## II. LEGISLATORS ACT IN THEIR LEGISLATIVE CAPACITY WHEN THEY PROPOSE OR VOTE ON MUNICIPAL LEGISLATION.

There is no question that the Individual Defendants’ challenged actions entailed proposing and voting on municipal legislation. Under the approach first enunciated by this Court in *Tenney v. Brandhove*, 341 U.S. 367 (1951), this should end the inquiry as to whether they were acting in a legislative capacity. As the Court held in *Tenney*, “courts should not go beyond the narrow confines of determining that [the challenged

<sup>11</sup> Significantly, Scott-Harris does not argue for this result and, indeed, only mentions *Lake Country Estates* twice in her 49-page brief. The argument she does make – that *Wood v. Strickland*, 420 U.S. 308 (1975), is controlling law – lacks merit. The holding in *Wood* was limited to a finding that individual school board members enjoyed qualified immunity “in the specific context of school discipline,” 420 U.S. at 322 – a context in which, among other distinctions, the school board members were deemed to act more in a judicial than in a legislative capacity. See *id.* at 319 (“School board members, among other duties, must judge whether there have been violations of school regulations and, if so, the appropriate sanctions for the violations.”). School board members also never possessed the traditional common law immunity which applies to legislators. Contrast *Lake Country Estates*, 440 U.S. at 403 n.24 (“legislative immunity ‘enjoys a unique historical position’”) (quoting Note, *Developments in the Law – Section 1983 and Federalism*, 90 Harv. L. Rev. 1133, 1200 (1977)) with *Wood*, 420 U.S. at 318 (“Common-law tradition . . . lead[s] to a construction of § 1983 extending a qualified good-faith immunity to school board members. . . .”). The utter lack of relevance of *Wood* in the legislative immunity setting is perhaps best illustrated by the fact that neither the majority nor the dissenting opinions in *Lake Country Estates*, decided just four years after *Wood*, found *Wood* sufficiently relevant to the issue before the Court as to warrant even a single cite.

action] may fairly be deemed within [the legislature’s] province.” *Id.* at 378. Scott-Harris nevertheless contends that it is critical to look beyond the function performed by the individual legislators and inquire into their motivations and/or the scope and nature of the challenged legislation. See Resp’t Br. at 38-42. This position is insupportable.

The impropriety of inquiry into motivation was established in *Tenney*, where this Court stated that “[t]he claim of an unworthy purpose does not destroy the privilege. . . . The privilege would be of little value if [legislators] could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury’s speculation as to motives.” *Tenney*, 341 U.S. at 377. In other words, only *after* an action has been found not to have been legislative does the issue of motivation become proper; it cannot be used to determine whether the action was legislative in the first instance. A contrary rule would have the invariable effect of rendering the resolution of the immunity defense indistinguishable from a determination of the merits of a plaintiff’s claim. See *Butz v. Economou*, 438 U.S. 478, 520 (1978) (Rehnquist, J., concurring and dissenting) (“It amounts to saying that an official has immunity until someone alleges he has acted unconstitutionally. But that is no immunity at all: The ‘immunity’ disappears at the very moment when it is needed.”).<sup>12</sup>

<sup>12</sup> This is clearly illustrated by the result of the approach followed by the First Circuit in the instant case, as well as by Scott-Harris’ defense of it. To quote from her Brief, “[i]n some cases, such as the present one, this inquiry [into whether challenged action is ‘legislative’] requires a factual determination by the jury as to the motivation of the persons who enacted the ordinance. . . . That analysis is the short answer to the question of whether the conduct in this case was ‘legislative’. Since the jury found the petitioners’ conduct did not involve any legitimate legislative activity, they have no legislative immunity.” Resp’t Br. at 38 n.50 (emphasis added). In short, under this approach, an individual legislator is entitled to immunity only if a jury finds that his or her action was “legitimate.” This is surely the equivalent of finding that the legislator has “no immunity at all.” *Butz v. Economou*, 438 U.S. at 520 (Rehnquist, J., concurring and dissenting).



The limited scope of the challenged legislation is an equally insupportable basis for a conclusion that immunity should not apply. There is nothing in the pre-1871 case law with respect to legislative immunity which could justify such an approach. The compelling public goals served by immunity apply with full force to legislation that affects only a narrow subject or limited number of people. No one would deny, and Scott-Harris does not, that state legislators or members of Congress act in a legislative capacity when they pass laws that are in relevant respects identical to the ordinance that eliminated her position. Indeed, as noted above, the challenged legislative action in *Tenney* involved a single individual; the Court nowhere suggested that this transformed the activity in question from protected "legislative" action to unprotected "administrative" action. Further, because most slander actions are based upon statements concerning specific individuals, focusing on the number of individuals aggrieved by a legislator's conduct would eviscerate the immunity doctrine with respect to defamation claims – an area where legislators are often most in need of protection, and which has deep roots in our constitutional and common law history. Cf. *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 733 (1980) (observing that in *Tenney*, the Court found state legislators' common law immunity similar in origin and rationale to that accorded Congressmen under the Speech and Debate Clause).<sup>13</sup>

The nature of the challenged legislation is equally irrelevant in determining whether immunity should attach. While the legislation

<sup>13</sup> Any rule which makes the availability of immunity turn upon the scope of the challenged legislation would also be both unrealistic and unworkable. Courts would be required to make hopeless distinctions between different kinds of legislative actions, elevating form over substance in so doing. To give just one of many possible examples: if a legislature enacted five or six separate ordinances, each eliminating one or two positions, over a period of weeks as part of an ongoing budgetary process, would each ordinance be viewed as "administrative"? In contrast, if the legislature decided to eliminate precisely the same number of positions in a single, more sweeping ordinance, would this now become "legislative"?

in question here – the elimination of a position (indeed, a department) in the context of budget making for the upcoming fiscal year – was quintessentially legislative in character, the precise nature of the legislation should not be dispositive.<sup>14</sup> The possible subjects of legislative activity and the forms which may be adopted to deal with those subjects are myriad; one searches in vain for any precedent or policy that would support the view that some would be considered "truly" legislative and that others would not. To return again to *Tenney*: "courts should not go beyond the narrow confines of determining that [the challenged legislation] may fairly have been deemed within [the legislator's] province," 341 U.S. at 378, for purposes of determining whether absolute immunity should apply.

### III. ABSENT A FINDING THAT CHALLENGED LEGISLATION IS UNLAWFUL, INDIVIDUAL LEGISLATORS CANNOT BE THE PROXIMATE CAUSE OF ANY ACTIONABLE INJURY TO A PLAINTIFF.

The Individual Defendants' position with respect to the third issue before the Court is straightforward. Scott-Harris

<sup>14</sup> Contrary to Scott-Harris' assertion, the Individual Defendants do not "concede" that legislative actions which result in the termination of an individual employee cannot be viewed as truly "legislative," and no such concession is "compelled" by the Court's decision in *Forrester v. White*, 484 U.S. 219 (1988). Resp't Br. at 39 n.53. The Court in *Forrester* found that a judge's termination of a probation officer was not entitled to absolute immunity, not because of the *form* of the action (termination versus position elimination) or because it affected only a single individual, but because the judge was not performing a *judicial function* with respect to the termination decision. See *Forrester*, 484 U.S. at 224-225, 229 (discussing the "functional approach" to immunity questions followed by the Court and finding that the defendant judge's challenged actions "were not themselves judicial or adjudicative").

Scott-Harris' related assertion that "this is not a close case" because an action cannot be characterized as inherently legislative "if it could just as readily have been done by an administrative official," to the extent it is correct at all, compels a judgment in favor of the Individual Defendants

claimed that they violated her constitutional rights by virtue of their role in enacting unconstitutional legislation. She failed to prove that the legislation was unconstitutional. It follows that the Individual Defendants' actions cannot be the proximate cause of any actionable injury to her.<sup>15</sup>

Contrary to Scott-Harris' characterization of the issue, therefore, the question is not whether the Individual Defendants' actions were the proximate cause of her dismissal. See Resp't Br. at 43. The issue is whether the Individual Defendants' actions were the proximate cause of her *unlawful* dismissal. When the judgment against the City was overturned, so too was any possible basis for a finding that the Ordinance – which could only be enacted by the City – was unlawful. The judgments against the Individual Defendants, legally and logically, should have been overturned as well.

The Individual Defendants have no controlling authority in support of their position because, insofar as they can glean from their legal research into this issue, the argument that an individual legislator can be held personally liable for his or her role in passing lawful legislation is unprecedented. Certainly Scott-Harris has cited no case which addresses this extraordinary proposition.<sup>16</sup>

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here. Resp't Br. at 39. It is uncontroverted that the Department of Health and Human Services, and Scott-Harris' position within it, could only be eliminated by legislative action. See J.A. at 88.

<sup>15</sup> Marilyn Roderick also continues to press the additional argument she made below: that she could not be the proximate cause of *any* injury to Scott-Harris, actionable or otherwise, because the legislation which resulted in the elimination of Scott-Harris' job (which was enacted by a six to two margin) would have passed with or without her affirmative vote. See Pet. Br. at 44.

<sup>16</sup> The case principally relied upon by Scott-Harris, *Malley v. Briggs*, 475 U.S. 335 (1986), demonstrates the fallacy of her position on this issue. In *Malley*, the plaintiff was wrongfully arrested based upon a police officer's submission of a false affidavit to a magistrate. The police officer was held personally liable because his false affidavits were the proximate cause of the plaintiff's *unlawful* arrest. In the instant case, in contrast, the

Permitting the judgment against the Individual Defendants to stand based upon this record will yield results which are as disastrous as they are absurd. A plaintiff need not make any attempt to establish that he or she was affected by unlawful legislation. Instead, the plaintiff can choose what Scott-Harris candidly describes as the "much simpler" route and simply focus on the actions and ulterior motives of one or more individual legislators. See Resp't Br. at 35. With respect to such individual legislators, the plaintiff will merely have to show that, regardless of whether the legislation itself was unlawful, the legislators favored it for "impermissible" reasons. Only one such legislator need be ferreted out in order for the plaintiff to recover all losses which flowed from the "injury" caused by the underlying legislation.

The anomalous nature of the end result is illustrated by this case. The Ordinance survived legal challenge and still has the force of law, the Department of Health and Human Services (and Scott-Harris' position within it) are still eliminated, and the City of Fall River continues to enjoy whatever benefits may have flowed from the enactment of the Ordinance and the elimination of the Department and Scott-Harris' position. At the same time, the two Individual Defendants have been found personally liable and face a staggering judgment for their role in the legislation's enactment. This simply cannot stand.

Finally, Scott-Harris' argument that the Individual Defendants failed to preserve their appellate rights on this issue is baseless. The Individual Defendants had no ground or reason to challenge the district court's jury instructions because, in contrast to the First Circuit, the district court clearly recognized the importance of a finding against the City as a necessary predicate to a finding of liability against the Individual Defendants. See Pet. Br. at 51 n.17.<sup>17</sup> It is for this reason that the Individual Defendants did not

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First Court ruled that there was no evidentiary basis for a finding that the Ordinance enacted by the City was unlawful. See App. to Pet. for Cert. at 53-63.

<sup>17</sup> The district court specifically instructed the jurors that if they were to find the City not liable, then they were to go no further with their deliberations. J.A. at 200-201, 213; see also *id.* at 137-141, Trial Transcript



object to the District Court's subsequent instructions on causation, to the effect that the jurors were to consider causation only if they first found that the City was liable and, therefore, that Scott-Harris had suffered a legally actionable injury arising out of the legislative process. The Individual Defendants believed, and continue to believe, that these instructions were correct. They require that the judgment against the Individual Defendants be reversed.

### CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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at 8:80, 81 (where, after counsel expressed concern as to whether the causation standard for the Individual Defendants had been made sufficiently clear, the district court responded by saying that "I would be reluctant to tamper with the proximate cause instruction. I said they can't find against these folks unless they find against the City of Fall River. . . .").

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Supreme Court, U.S.

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In The  
**Supreme Court of the United States**  
October Term, 1997

DANIEL BOGAN AND MARILYN RODERICK,  
*Petitioners,*  
versus

JANET SCOTT-HARRIS,  
*Respondent.*

On Writ Of Certiorari To The  
United States Court Of Appeals  
For The First Circuit

**SUPPLEMENTAL BRIEF FOR PETITIONERS**

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## INTRODUCTION

On November 7, 1997, the Court of Appeals for the Seventh Circuit issued a decision in two cases which had been consolidated on appeal, *Ira Iglesia de la Biblia Abierta v. Banks*, No. 97-1041 (Nov. 7, 1997), and *C.L.U.B., et al. v. Huels*, No. 97-1415 (Nov. 7, 1997) [hereinafter *C.L.U.B.*].<sup>1</sup> The Seventh Circuit confirmed in *C.L.U.B.* that absolute legislative immunity applies to local legislators who propose and vote on legislation, even if that legislation affects only a single entity. Petitioners submit this Supplemental Brief in order to bring the *C.L.U.B.* decision to the attention of this Court.

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## ARGUMENT

### THE SEVENTH CIRCUIT'S DECISION IN *C.L.U.B.* SQUARELY SUPPORTS PETITIONERS' POSITION HEREIN.

#### A. The Facts in *C.L.U.B.*

The facts of the two cases before the Seventh Circuit in *C.L.U.B.* are virtually identical. *Ira Iglesia de la Biblia Abierta* and *His Word Ministries to All Nations* ("the Churches") sued the City of Chicago and Aldermen Banks and Huels respectively, alleging constitutional and civil rights violations arising out of zoning ordinances

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<sup>1</sup> A copy of the Seventh Circuit's decision in *C.L.U.B.* is included with this Supplemental Brief for the Court's convenience as Appendix A. In order to assist this Court, citations herein to *C.L.U.B.* refer to the pagination in this Appendix.

passed in response to proposals submitted by the aldermen. The Seventh Circuit held that the suits against Banks and Huels must fail because both aldermen were entitled to absolute immunity for their legislative actions.

### B. The Holding in *C.L.U.B.*

The Seventh Circuit began its opinion in *C.L.U.B.* by observing that it had previously granted the same absolute immunity to local legislators that state and federal legislators enjoy under *Tenney v. Brandhove*, 341 U.S. 367 (1951), and the Speech and Debate Clause of the U.S. Constitution.<sup>2</sup> The Seventh Circuit reaffirmed this holding in *C.L.U.B.*, recognizing that the same policy rationales that justify immunity at the state and federal levels also apply at the local level. See *C.L.U.B.* at 8a (local legislators need the freedom to legislate without "fear of outside interference" in order to preserve "the rights of the people to representation in the democratic process") (citation omitted). Without absolute immunity, private lawsuits "threaten[ ] to chill zealous representation by encouraging legislators to avoid controversial issues or stances in order to protect themselves . . .". *Id.*<sup>3</sup>

<sup>2</sup> As noted in Petitioners' Main Brief, the Seventh Circuit has been joined in this holding by eleven other Circuit Courts of Appeals. See Pet. Br. at 20-21.

<sup>3</sup> The Churches were not left without a remedy by the dismissal of the suits against the aldermen. The Seventh Circuit allowed the lower courts' denials of the City of Chicago's motions to dismiss to stand.

The Seventh Circuit then held that "[i]ntroducing and voting on legislation are elements of the core legislative process and cannot be separated from that legislative function. As such, they are entitled to absolute immunity." *Id.* at 10a (citation omitted). The court elaborated on the vital importance of absolute immunity for legislators performing this traditional legislative activity:

If legislators feared that they would be subject to civil liability for their attempts to introduce new legislation or propose amendments, our government would become stagnant; changes would not be considered, let alone implemented. To encourage legislators best to represent their constituents' interests, legislators must be afforded immunity from private suit. If this protection is not provided, the structure of our government would collapse.

*Id.* at 10a.

The court went on to reject the argument – also made by Respondent herein – that legislative acts do not qualify for immunity if they affect only a few individuals. As the court noted, "[w]e have repeatedly held that the availability of absolute immunity does not depend upon the number of people that a law happens to affect at the time of its passage." *Id.* at 11a.<sup>4</sup>

The court also noted that when determining whether absolute immunity applies, "motive is not an element to be considered." *Id.* at 7a. Citing decisions by this Court in

<sup>4</sup> This view reflects the approach followed by this Court in *Tenny v. Brandhove*, 341 U.S. 367 (1951), with respect to state legislators. See Pet. Reply Br. at 11.



*U.S. v. Brewster*, 408 U.S. 501 (1972), and *Tenney v. Brandhove*, 341 U.S. 361 (1951), the court held that the individual defendants in *C.L.U.B.* were entitled to absolute immunity because "[a]n inquiry into a legislator's motives for his actions, regardless of whether those reasons are proper or improper, is not an appropriate consideration for the court." *Id.* at 14a.

### C. The Significance of *C.L.U.B.*

Petitioners bring the Seventh Circuit's decision in *C.L.U.B.* to this Court's attention to illustrate four tenets consistently adopted by the lower courts which squarely support Petitioners' position herein. First, absolute immunity extends to local, as well as state and federal, legislators. Second, when a local official proposes and votes on legislation, he or she is performing a traditional legislative function of the sort typically granted absolute immunity. Third, a law is not deprived of its legislative nature, and transformed into an administrative or executive act, simply because it affects a limited number of people. Finally, legislators' motives are not a proper factor to consider in determining whether absolute immunity applies. In sum, the Seventh Circuit, like numerous other courts before it, has taken the position that local legislators, proposing and enacting legislation that affects a limited number of people, are entitled to absolute immunity, with no inquiry into the motives for their actions.

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### CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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**In the  
United States Court of Appeals  
for the Seventh Circuit**

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No. 97-1041

IRA IGLESIA DE LA BIBLIA ABIERTA,

*Plaintiff-Appellee,*

*v.*

WILLIAM BANKS,

*Defendant-Appellant.*

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Appeal from the United States District Court  
for the Northern District of Illinois, Eastern Division.  
No. 96 C 3487 - **John F. Grady, Judge.**

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No. 97-1415

C.L.U.B. (Civil Liberties for Urban Believers), CHRIST CENTER, CHRISTIAN COVENANT OUTREACH CHURCH, HIS WORD MINISTRIES TO ALL NATIONS, CHRISTIAN BIBLE CHURCH, CHURCH ON THE WAY PRAISE CENTER, MONTE DE SION (Mount Zion) CHURCH, and LIVING WORD MINISTRIES,

*Plaintiffs-Appellees,*

*v.*

PATRICK HUELS,

*Defendant-Appellant.*

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Appeal from the United States District Court  
for the Northern District of Illinois, Eastern Division.  
No. 94 C 6151 – Wayne R. Anderson, Judge.

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ARGUED SEPTEMBER 25, 1997 – DECIDED NOVEMBER 7, 1997

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Before POSNER, Chief Judge, and BAUER and EVANS, Circuit Judges.

BAUER, Circuit Judge. Ira Iglesia de la Biblia Abierta ("Biblia Abierta") filed a complaint against Alderman William Banks ("Banks"), alderman for the 36th Ward in Chicago, Illinois, alleging that the alderman violated Biblia Abierta's civil rights by introducing a zoning ordinance to the Chicago City Council Zoning Committee and voting for the ordinance. Alderman Banks' participation in these activities ultimately resulted in the passage of the zoning ordinance which prevented Biblia Abierta from acquiring a particular parcel of property located in the 36th Ward to use as its church. His Word Ministries to All Nations ("His Word") filed a similar complaint against then Alderman Patrick Huels ("Huels"), former alderman for the 11th Ward in Chicago, also alleging that the alderman violated His Word's civil rights by introducing a zoning ordinance to the City Council Zoning Committee and voting for the ordinance. Huels' participation in these activities ultimately resulted in the passage of the zoning ordinance which prevented His Word from acquiring a particular parcel of property in the 11th Ward to use as its church. In substantially identical motions asserting legislative immunity, Aldermen Banks and Huels claimed that their conduct involved core legislative activities and,

therefore, they were entitled to absolute legislative immunity. Judge Grady in the Northern District of Illinois denied Alderman Banks' motion to dismiss, finding that he was not entitled to absolute legislative immunity. Judge Andersen, also in the Northern District of Illinois, denied Alderman Huels' motion for summary judgment, finding that Huels also was not entitled to absolute legislative immunity. Aldermen Banks and Huels now appeal, and these appeals were consolidated. For the reasons set forth below, we reverse the district courts' judgments and conclude that both Alderman William Banks and former Alderman Patrick Huels are entitled to absolute legislative immunity.

### Background

#### A. William Banks

William Banks is the 36th Ward alderman in Chicago and was, during the relevant time in question, Chairman of the Chicago City Council's Committee on Zoning (the "Zoning Committee"). Biblia Abierta is a religious organization with a predominantly Hispanic congregation. It is incorporated as an Illinois not-for-profit corporation. On June 20, 1994, Biblia Abierta contracted to purchase a parcel of property located in the 36th Ward of Chicago at 6466 West North Avenue. Biblia Abierta intended to use the property as a church where its congregation could meet and assemble for worship.

According to the zoning law in effect at the time, the property at 6466 West North Avenue was zoned B4-1 under the Chicago Zoning Ordinance. Under this ordinance, B4-1 property could be used as a church, subject to

obtaining a special use permit from the City's Zoning Board of Appeals ("ZBA"). Accordingly, Biblia Abierta filed an application with the ZBA to obtain a special use permit for the property. The ZBA scheduled a hearing for August 19, 1994 to review Biblia Abierta's application for a special use permit.

Before the scheduled date of the ZBA hearing, Alderman Banks introduced an ordinance (the "Ordinance") to rezone the property in question. The Ordinance proposed to change the zoning classification of 6466 West North Avenue to prohibit use of the property as a church by right or by special use permit. Before the ZBA voted on Biblia Abierta's request for a special use permit, it postponed the hearing to September 15, 1994, as requested by Alderman Banks. Thereafter, the Zoning Committee voted unanimously to recommend passage of the Ordinance. After receiving the recommendations of the Zoning Committee and before the ZBA voted on Biblia Abierta's application, the City Council voted to enact the Ordinance. The enactment of this Ordinance prevented Biblia Abierta from purchasing the property for use as a church.

On June 10, 1996, Biblia Abierta filed a complaint against the City of Chicago and Alderman Banks, alleging civil rights violations and violations of the First and Fourteenth Amendments of the United States Constitution and similar provisions of the Illinois Constitution. The defendants filed a motion to dismiss the complaint on August 7, 1996, claiming, *inter alia*, that Alderman Banks was entitled to absolute legislative immunity for his participation in the rezoning of 6466 West North

Avenue. Judge John J. Grady denied the motion to dismiss. Alderman Banks now appeals.

#### B. Patrick Huels

Patrick Huels was, at the relevant times in question, the 11th Ward alderman in Chicago. His Word is a religious organization incorporated as an Illinois not-for-profit corporation. On March 27, 1992, His Word entered into a contract to purchase a parcel of property at 1616 West Pershing with the intent to use the property for its church services. At that time, the property at 1616 West Pershing was zoned C1-2, which allows the property to be used as a church so long as a special use permit is first obtained from the ZBA. On March 30, 1992, His Word filed an application for a special use permit with the ZBA. Thereafter, the ZBA set a hearing date for June 19, 1992 to review the application, but the hearing was continued until August 21, 1992. On August 21, Alderman Huels asked the ZBA to again continue the hearing to review His Word's application until October 16, 1992.

On October 14, 1992, Alderman Huels proposed a rezoning ordinance (the "Ordinance") to the Zoning Committee to change the zoning classification at 1616 West Pershing to prevent the property from being used as a church even with a special use permit. On October 16, the ZBA continued the hearing to review His Word's special use permit application until December 18, 1992. Despite His Word's opposition to the Ordinance, the Zoning Committee unanimously voted to recommend its passage to the City Council. On December 15, 1992, the City



Council accepted the Zoning Committee's recommendations and voted to enact the Ordinance. Consequently, His Word was unable to purchase the property for use as a church.

On October 11, 1994, His Word, along with six other churches and an organization of churches known as Civil Liberties for Urban Believers ("C.L.U.B."), filed their initial complaint, alleging various civil rights violations and violations of the First and Fourteenth Amendments of the United States Constitution and similar provisions of the Illinois Constitution. Count XII of that complaint specifically alleged that the actions of Alderman Huels and the City of Chicago deprived His Word and other similarly situated churches of their civil rights. In response, Alderman Huels filed a motion to dismiss on January 27, 1995, asserting absolute legislative immunity. That motion was denied by Judge Wayne R. Andersen on February 26, 1996. Huels subsequently filed a motion for summary judgment also based on absolute legislative immunity which Judge Andersen denied on January 23, 1997. Alderman Huels now appeals the order denying summary judgment.

On March 19, 1997, this Court ordered consolidation of Aldermen Banks' and Huels' appeals for purposes of briefing and disposition. On appeal, both Aldermen Banks and Huels argue that they are entitled to absolute legislative immunity, asserting that as local legislators: (1) they are absolutely immune from suit for introducing and voting for the Ordinances; and (2) their requests to continue the ZBA hearings are also protected conduct for which they are entitled to absolute legislative immunity.

### Analysis

We review a district court's decision to grant or deny summary judgment *de novo*, reviewing all factual inferences in the light most favorable to the non-moving party to determine whether there exists any genuine issue of material fact. *McGinn v. Burlington Northern R.R. Co.*, 102 F.3d 295, 299 (7th Cir. 1996). We review a district court's decision to grant or deny a motion to dismiss under 12(b)(6) *de novo*, accepting the well-pled allegations in the complaint as true and drawing all inferences in favor of the non-moving party. *Porter v. DiBlasio*, 93 F.3d 301, 305 (7th Cir. 1996).

As a preliminary matter, a brief discussion of the doctrine of absolute legislative immunity is in order. In civil cases, common law absolute legislative immunity offers protection similar to that available to federal legislators under the United States Constitution's Speech and Debate Clause. *Thillens, Inc. v. Community Currency Exchange Assoc. of Illinois, Inc.*, 729 F.2d 1128, 1130 (7th Cir. 1984). In *Tenney v. Brandhove*, 341 U.S. 367 (1951), the Supreme Court held that state legislators were absolutely privileged in their legislative acts in any action against them for damages. Moreover, *Tenney* firmly established that motive is not an element to be considered when determining absolute legislative immunity. *Id.* at 377. "The claim of an unworthy purpose does not destroy the privilege [of absolute legislative immunity]." *Id.* This Court subsequently extended absolute legislative immunity protection to local legislators. See *Rateree v. Rockett*, 852 F.2d 946, 950-51 (7th Cir. 1988).

The doctrine of absolute legislative immunity recognizes that when acting collectively to pursue a view of the public good through legislation, legislators must be free to represent their constituents "without fear of outside interference" that would result in private lawsuits. *Supreme Court of Virginia v. Consumers Union of United States, Inc.*, 446 U.S. 719, 731 (1980). Any restriction on a legislator's freedom undermines the public good by interfering with the rights of the people to representation in the democratic process. *Tenney*, 341 U.S. at 377. Of course, legislators are bound to respect the limits placed on their discretion by both the United States Constitution and individual state constitutions. But when acting "in the sphere of legitimate legislative activity," *id.* at 376, legislators are to be "immune from deterrents to the uninhibited discharge of their legislative duty." *Id.* at 377. Private lawsuits threaten to chill zealous representation by encouraging legislators to avoid controversial issues or stances in order to protect themselves "not only from the consequences of litigation's results but also from the burden of defending themselves." *Supreme Court of Virginia*, 446 U.S. at 732 (quoting *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967)).

As *Tenney* firmly established, absolute immunity shields a legislator's conduct even when that conduct is based on improper motives. *Tenney*, 341 U.S. at 378. See also *Rateree*, 852 F.2d at 951. "Absolute immunity, however, only applies to those legislators acting in their legislative capacity." *Rateree*, 852 F.2d at 950. Courts have granted absolute legislative immunity to legislators for various activities which include: (1) core legislative acts such as introducing, debating, and voting on legislation;

(2) activities that could not give rise to liability without inquiry into legislative acts and the motives behind them; and (3) activities essential to facilitating or preventing the core legislative process. See, e.g., *Gravel v. United States*, 408 U.S. 606, 616 (1972) (immunity granted for senator's actions in subcommittee to protect legislative process); *United States v. Brewster*, 408 U.S. 501, 526 (1972) (immunity granted where it would be necessary to inquire into how a legislator spoke, debated, voted, or acted); *Dombrowski v. Eastland*, 387 U.S. 82, 84-85 (1967) (immunity granted for legislative committee's act of subpoenaing records for use in its hearings).

Now, we turn to the facts of these cases. First, Aldermen Banks and Huels argue that they are absolutely immune from suit for introducing and voting for the zoning ordinances. They contend that introducing and voting for legislation are core legislative activities which are entitled to absolute immunity. The Churches,<sup>1</sup> however, assert that Aldermen Banks and Huels engaged in conduct beyond the narrow scope of "core" legislative activity protected by legislative immunity. Therefore, the Churches argue, the aldermen are not entitled to immunity. The district courts recognized the significance of the doctrine of absolute legislative immunity, yet neither district judge found that the aldermen were entitled to absolute legislative immunity. The district courts did not deny that introducing and voting on legislation are protected legislative activities, but rather questioned whether the

<sup>1</sup> In the following discussion when referring to Biblia Abierta and His Word collectively, we will address them as "the Churches."



aldermen's conduct fell outside the core of protected activity.

Introducing and voting on legislation are elements of the core legislative process and cannot be separated from that legislative function. See *Rateree*, 852 F.2d at 950. As such, they are entitled to absolute immunity. *Id.* Introducing legislation naturally is the first step in the legislative process. If legislators feared that they would be subject to civil liability for their attempts to introduce new legislation or propose amendments, our government would become stagnant; changes would not be considered, let alone implemented. To encourage legislators best to represent their constituents' interests, legislators must be afforded immunity from private suit. If this protection is not provided, the structure of our government would collapse. The challenged activities at issue in these appeals are precisely introducing and voting on legislation and clearly fall within the core of legislative activities. Any alderman's participation in introducing and voting for a rezoning ordinance is entitled to absolute legislative immunity.

Next, Banks and Huels argue that the rezoning ordinances constitute legislation for immunity purposes. The Churches contend that the passage of a rezoning ordinance does not qualify as legislation, but rather qualifies as an administrative or executive act. So they say, legislative immunity is not appropriate. On this point the district courts differed, but still ultimately concluded that the aldermen were not entitled to legislative immunity. Judge Andersen held that "[r]ules which apply only to certain individuals appear more like executive or administrative decisions than legislative ones." *C.L.U.B. v. City*

*of Chicago*, No. 94 C 6151, 1996 WL 89241, at \*35 (N.D. Ill. Feb. 27, 1996). Judge Grady, however, was "not persuaded that an act cannot be legislative in character unless it is directed to the general community. . . ." *Ira Iglesia de la Biblia Abierta v. City of Chicago*, No. 96 C 3487, 1996 WL 714538, at \*9 (N.D. Ill. Dec. 6, 1996). Despite the different analyses, both district courts concluded that Aldermen Banks and Huels were not immune from liability.

We have repeatedly held that the availability of absolute immunity does not depend upon the number of people that a law happens to affect at the time of its passage. See *Rateree*, 852 F.2d at 950 (city commissioners entitled to legislative immunity even though their actions affected only a few individuals); *Reed v. Village of Shorewood*, 704 F.2d 943 (7th Cir. 1983) (ordinance which reduced the number of Class A liquor licenses and affected only a few people who previously had licences was legitimately legislative and trustees were entitled to immunity). Although the initial effect of these zoning ordinances impacts the Churches, the ordinances apply equally to all persons. In passing the ordinances, the Zoning Committee and the City Council created neutral, prospective rules that apply to all current and future owners of the property. Although the Churches had entered into contracts to purchase the properties in question, their interests in the use for the parcels of land had not vested. Such use required a special use permit, and there was no guarantee that they would automatically receive the permits. Despite the fact that the ordinances' most immediate impact falls on a limited group of people, immunity still attaches to the aldermen's actions.

The Churches emphasize that both Alderman Banks and Alderman Huels had knowledge of the fact that Biblia Abierta and His Word had entered into contracts to purchase the properties and had filed applications with the ZBA for special use permits. The Churches allege that because of this knowledge the aldermen's participation was not legislative and, therefore, not entitled to immunity. Knowledge of the contracts to purchase the properties is immaterial to this inquiry and has no impact on whether Aldermen Banks and Huels are absolutely immune from liability.

Fundamentally, the issue on appeal involves a legal question: Is the rezoning of a single parcel of property legitimately legislative whereby aldermen who participate in the passage of an ordinance are entitled to absolute legislative immunity? There is no question of fact that would affect the outcome of these cases. Inquiry into the aldermen's knowledge of the contracts relates to motive, and motive is not a proper consideration for legislative immunity. See *Tenney*, 341 U.S. at 378; *Brewster*, 408 U.S. at 526. The rezoning of a single parcel of property is a question of law, and there is no need for fact finding. It is not the role of district court judges to make factual determinations each and every time a rezoning issue comes before them. Legislators/aldermen are entitled to know, as a matter of law, whether or not rezoning is legitimately legislative. We believe that rezoning (including participation in the introduction and passage of a rezoning ordinance) is a legitimate legislative activity.

Finally, Aldermen Banks and Huels assert that their requests to continue the ZBA hearings also are legislative

functions that are entitled to immunity. They argue that establishing liability upon the continuance requests would require prohibited inquiry into core legislative activity. Banks and Huels argue that their requests were essential to preserve the City Council's legislative prerogatives. The Churches, however, contend that these requests fall within the ambit of extra-legislative conduct and go beyond the narrow scope of protected core legislative activity. The district courts agreed with the Churches and similarly questioned whether "making the request was the exercise of a legislative function." *Ira Iglesia de la Biblia Abierta v. City of Chicago*, No. 96 C 3487, 1996 WL 714538, at \*8 (N.D. Ill. Dec. 6, 1996). Judge Grady further recognized that "legislative immunity applies only to acts which are part of the legislative process itself, such as voting, and does not extend into activities 'that are casually or incidentally related to legislative affairs. . . .'" *Id.* at \*7 (quoting *United States v. Brewster*, 408 U.S. 501, 528 (1972)). Judge Andersen similarly concluded that he was "not fully convinced that Alderman Huels' conduct was completely legislative in nature" and, therefore, entitled to absolute immunity.<sup>2</sup> *C.L.U.B. v. City of Chicago*, No. 94

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<sup>2</sup> We recognize that the district court judges questioned the integrity of Aldermen Banks and Huels in their proposing and voting for the zoning ordinances and, in particular, their requests to the ZBA for continuances. However, this appeal involves a question of law and not fact. Although the district court judges may have wanted to take a stand against suspicious aldermanic actions, the issue on appeal is whether rezoning qualifies as legislation, and there is no place for an inquiry into the facts. As the United States Supreme Court firmly established in *Tenney*, consideration of the aldermen's motives is not proper inquiry. Consequently, with motive not



C 6151, 1997 WL 43226, at \*2 (N.D. Ill. Jan. 27, 1997). See also *C.L.U.B. v. City of Chicago*, No. 94 C 6151, 1996 WL 89241, at \*17-18 (N.D. Ill. Feb. 27, 1996).

As a threshold matter, it is important to note that even if the continuances had not been requested and granted, there was no guarantee that Biblia Abierta or His Word would have automatically received the special use permit. The ZBA does not grant special use permits as a matter of right. Moreover, the aldermen's requests for postponements did not translate into automatic continuances. The ZBA, in its discretion, granted the continuances.

By questioning the aldermen's requests to postpone the ZBA hearings, the inquiry would also inevitably be directed at other conduct which would include their legislative acts. An inquiry into a legislator's motives for his actions, regardless of whether those reasons are proper or improper, is not an appropriate consideration for the court. *Brewster*, 408 U.S. at 526. The United States Supreme Court stated in *Tenney*:

In times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed. Courts are not the place for such controversies. Self discipline and voters must be the ultimate reliance for discouraging or correcting such abuses.

*Tenney*, 341 U.S. at 378 (footnote omitted). The requests to continue the hearings were inextricably intertwined with

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taken into account, as a matter of law, Aldermen Banks and Huels are entitled to absolute legislative immunity.

the legislative process of introducing and voting on the zoning ordinances and cannot be separated from those legislative functions.

Additionally, the requests to continue the hearings were necessary and proper to the exercise of legislative authority. They preserved the full scope of the City Council's ability and authority to legislate. As discussed above, a rezoning ordinance is legitimately legislative. Thus, it is within an alderman's legislative discretion to request a postponement. An alderman ought to be able to notify an administrative board or agency that legislation is going to be considered that may impact its decision and that the board or agency, in its discretion, may wish to postpone its review until the legislation is considered.

### Conclusion

For the foregoing reasons, we conclude that Alderman William Banks and former Alderman Patrick Huels are absolutely protected by the legislative immunity doctrine for introducing and voting on rezoning ordinances and for requesting continuances of the ZBA hearings. The judgments below are REVERSED and the cases are REMANDED with instructions to enter judgments for the defendants.

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(5)

Supreme Court, U. S.

F I L E D

AUG 14 1997

CLERK

No. 96-1569

**In the Supreme Court of the United States**

October Term, 1997

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MARILYN RODERICK, AND DANIEL BOGAN,  
*Petitioners,*

v.

JANET SCOTT-HARRIS,  
*Respondent.*

---

**AMICUS CURIAE BRIEF**

On Behalf of the City of Fall River, Massachusetts

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August 12, 1997

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24 pp



## TABLE OF CONTENTS

Interest of the Amicus Curiae.....	1
Summary of Argument.....	3
Argument.....	5
Conclusion.....	21

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**AMICUS CURIAE BRIEF**

On Behalf of the City of Fall River, Massachusetts

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**INTEREST OF THE AMICUS CURIAE**

Facing the reality of a ten percent cut in local aid from the State, acting Mayor Daniel Bogan asked the City Administrator for alternative plans to deal with the impending fiscal constraints. One



plan was suggested by the plaintiff, among other savings she suggested reducing the number of hours that nurses would be available in the schools and senior centers in the City. The plan Bogan settled upon resulted in the elimination of 135 positions, 27 of which were occupied. One of those positions was the Plaintiffs.<sup>1</sup>

Before being able to present a budget to the City Council for passage, Bogan was required to eliminate any positions in City ordinance. Otherwise, he would be forced to finance those positions for the coming fiscal year. And thus, no savings would be realized. Bogan did this. The committee on ordinances, which Councilor Marilyn Roderick chaired, reported favorably on the elimination of the position. Later the City Council passed the budget which entailed eliminating the positions noted above. And Bogan signed it. The hallmark of a "traditional legislative function" is its creation of prospective, legislative-type policies rather than the quotidian task of applying existing policy." *See Prentiss v. Atlantic Coastline Co.*, 211 U.S. 210, 226 (1908)("Legislation ... looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power.")

Bogan and Roderick have tried to assert their absolute immunity from the inception of this litigation. Now, saddled with

<sup>1</sup> Albeit at a lower salary, the Plaintiff was the only individual offered another position.

considerable financial burdens and personal reserves depleted, they stand before the United States Supreme Court still asserting their absolute immunity. The City's interest is simple; if a budget is passed which results in any attrition, how much additional money should be appropriated to the Law Department? And, how much time should a local legislator expect to spend litigating as opposed to legislating?

### SUMMARY OF ARGUMENT

This case involves two local elected officials performing a purely legislative function; a councilwoman voting on passage of a city ordinance and a mayor completing the legislative process by signing the city ordinance. The enactment of budgetary items is a fundamental part of the legislative process and local officials performing this legislative function should be granted absolute immunity. Without such immunity local legislators would avoid the tough call, the controversial issues, for fear of the threat of litigation and the costly reality of defending oneself. *Supreme Court of Virginia v. Consumers Union of the United States*, 446 U.S. 719, 732 (1980).

This Court has found absolute immunity for each legislative level presented to it. *See Kilbourn v. Thompson*, 103 U.S. 168, 202-204 (1880)(federal level), *Tenney v. Brandhove*, 341 U.S. 367,

379 (1951)(state level); *Lake Country Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391,406 (1979)(regional level). A local legislator and local legislative acts deserve the same protections afforded to those at the regional, at the state, and at the federal levels. To do otherwise is to decide that local legislators are a lesser form of representative. In granting absolute immunity the Court should look to the function of the act rather than the status or level at which the official serves. Roderick's vote in passage of the city ordinance and Bogan's signature upon the ordinance are quintessential legislative functions. As long as the act is legislative it does not matter who performs it. *See Lake Country, supra*, 440 U.S. at 404-405.

The City's interest in this case is to ensure the proper operation of government. To that end, it requires the recognition that local legislators and local legislative acts need the protection afforded to other legislators. To promote free debate and the proper operation of government a legislator must act for the City's good, not for fear of his or her harm.

The decision of the First Circuit in this case, while claiming to give absolute immunity to local officials, actually affords them a standard of qualified immunity and moreover, a qualified immunity that has a subjective standard. If allowed to stand the decision of the First Circuit would have a chilling effect upon the local

legislative process. And, it is not unreasonable to believe that otherwise qualified candidates would think better of seeking local elective office. To avoid such a result this Court should extend absolute immunity to local officials for acts performed within the parameters of the legislative process.

## ARGUMENT

### I. FEDERAL, STATE, AND REGIONAL LEGISLATORS WHO PERFORM LEGISLATIVE FUNCTIONS ARE ENTITLED TO ABSOLUTE IMMUNITY. THIS REASONING IS NO LESS APPROPRIATE FOR LOCAL ELECTED OFFICIALS.

The concept of immunity is neither novel nor new. This Court has long recognized the doctrine of state immunity set forth in the Eleventh Amendment. This Court's decisions regarding Eleventh Amendment sovereign immunity recognize the "respect owed [the States] as members of the federation." *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146,(1993). Although not directly applied to counties, *Mt. Healthy City School District v. Doyle*, 429 U.S. 274, 280(1977), Eleventh Amendment immunity has been extended to counties where a judgment against them would impact the State treasury. *See, e.g., Edelman v. Jordan*, 415 U.S. 651 (1974)(Eleventh Amendment bars suit against state and county officials for retroactive award of welfare benefits).



The doctrine of immunity also exists in the common law. *Spallone v United States*, 493 U.S. 265, 278 (1990). "[T]he immunity of legislators from civil suit for what they do or say as legislators has its taproots in the parliamentary struggles of 16th- and 17th-century England; such immunity was consistently recognized in the common law and was taken as a matter of course by our Nation's founders." *Lake Country Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391, 403 (1979).

Further, federal legislative immunity exists in the Speech or Debate clause. *Powell v. McCormack*, 395 U.S. 486, 503 (1969)("[T]he legislative immunity created by the Speech or Debate Clause ... insures that legislators are free to represent the interests of their constituents without fear that they will be later called to task in the courts for that representation."). Thus, legislative immunity exists statutorily, constitutionally, and by common law. Indeed, "[i]t was deemed so essential for representatives of the people that it was written into the Articles of Confederation and later into the Constitution." *Tenney*, 341 U.S. at 372. The Civil Rights Act did not abrogate this sovereign immunity. *Tenney* 341 U.S. at 376.

Immunity exists not as a shield for scoundrels, but as a sword for the public good. This Court's decisions have recognized that without immunity, the peoples' right to representation is

undermined. *Lake Country*, *supra*, 440 U.S., at 404-405, *Tenney*, *supra*, 341 U.S. at 377.<sup>2</sup> Without immunity legislators would avoid the tough call, the controversial issues, for fear of the threat of litigation and the costly reality of defending oneself. *Supreme Court of Virginia v. Consumers Union of the United States*, 446 U.S. 719, 732 (1980).

The threat of litigation will now become a part of the democratic process and by doing so, will distort it. At the very least, it will distract the legislators. *See Tenney*, 341 U.S. at 377 (affording absolute immunity to legislators obviates the fear that they will be "subjected to the cost and inconvenience and distractions of a trial"). It is not merely the possible result of the litigation that is feared; it is also the prospect of having to defend oneself. *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967).

If a legislative scoundrel exists, granting legislative immunity does not remove the significant checks against him or her. If a

<sup>2</sup> As Justice Frankfurter wrote:

The reason for the privilege is clear. It was well summarized by James Wilson, an influential member of the Committee of Detail which was responsible for the provision in the Federal Constitution. "In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offense." II Works of James Wilson (Andrews ed. 1896) 38.

*Tenney*, 341 U.S. at 373.

proper suit lies, it can lie against the municipality which does not have immunity. See *Lake Country Estates*, 440 U.S. at 405 n.29 (citing *Monell v. New York City Dep't of Social Serv.*, 436 U.S. 658, 663 (1978); *Aitchinson v. Raffiani*, 708 F. 2d 943, 953 (3d Cir. 1983) (an action can still lie against a municipality regardless of the legislator's absolute immunity). If a real scoundrel appears a criminal remedy exists for willful deprivations of constitutional rights under color of state law. 18 U.S.C. sec. 242. *Imbler v. Pachtman*, 424 U.S. 409, 429 (1975); see *United States v. Gillock*, 445 U.S. 360, 372 (1980)(no authority for extension of official immunity to criminal cases). Perhaps, the most appropriate check in a vital democracy is that of the ballot box. See *Tenney, supra*, 341 U.S. at 378 ("In times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed. Courts are not the places for such controversies. Self-discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses."); see also, e.g., *Rateree v. Rockett*, 852 F. 2d 946, 951 (7th Cir. 1988)("one recourse in dealing with legislators who hide behind their shield of immunity and vote 'improperly' is of course, a resort to the ballot box.").

Further, this Court has determined that at some point the need for absolute immunity outweighs the potential harms attendant to it.

See *Pierson v. Ray*, 386 U.S. 547 (1967)(absolute immunity for judges), *Imbler v. Pachtman*, 424 U.S. 409, 428 (1975)(in a case involving absolute immunity for prosecutors, the Court found that it is "better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation").

There are myriad examples of how this immunity has been applied. In the Legislative context, this Court has seen fit to determine that only absolute immunity would be the proper standard. *Tenney, supra*, 341 U.S. at 399. Further, with each legislative level presented to it, this Court has found absolute immunity. See *Kilbourn v. Thompson*, 103 U.S. 168, 202-204 (1880)(federal level); *Tenney*, 341 U.S. at 379 (state level); *Lake Country Estates*, 440 U.S. at 406 (regional level). It is the similarity of the function that prompted similar treatment. 440 U.S. at 406. Given the Court's analysis that the Speech and Debate clause cloaks legislators only when acting in their legislative capacity, the Court has fashioned a functions test. *Forrester*, 484 U.S. at 222; see also *Buckley v. Fitzsimons*, 509 U.S. 259, 269 (1993).

Legislators who act outside of legislative parameters are entitled to no greater immunity than that of the executive branch: qualified immunity. But just as a legislator is treated differently when he or she acts non-legislatively, so too is an executive officer who acts



non-executively. If an executive officer acts legislatively, he should be afforded the same treatment as a legislator. *Cf. Butz v. Economou*, 438 U.S. 478 (1978) (Although involving a Bivens action and not a sec. 1983 action, the court applied the same reasoning for immunity analysis and recognized absolute immunity for individuals performing judicial and prosecutorial functions within the Department of Agriculture), *Supreme Court of Virginia*, 446 U.S. at 734 (Virginia Supreme Court Judges entitled to the absolute immunity afforded a legislator because they were essentially functioning as legislators).

The protections afforded elected officials can be seen as an umbrella; they shield such individuals, but only if they are acting in a legislative fashion. The umbrella though wide, is not all encompassing. There are only limited instances in which an executive acts legislatively. Such an instance exists here. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 121 (1976) (No complete separation of powers within Constitution as "[t]he President is a participant in the law-making process by virtue of his authority to veto bills enacted by Congress."); *Edwards v. United States*, 286 U.S. 482, 491 (1932) (President's signing into law of bill passed by Congress is a legislative act). The Fifth Circuit has specifically addressed this issue:

"The mayor's veto, like the veto of the President or a state governor, is undeniably a part of the

legislative process. It differs only that it takes place at the local level. When the mayor exercises his veto power, it constitutes the policy-making decision of an individual elected official. It is as much an exercise of legislative decision making as is the vote of a member of Congress, a state legislator, or a city councilman."

*Hernandez v. City of Lafayette*, 643 F. 2d 1188, 1194 (1981).

Roderick's vote was necessary in order to pass the municipal budget. Bogan's endorsement was necessary in order to complete the legislative process. Without the votes from the Council no budget could pass. Without the Mayor's endorsement no budget could take effect. To permit disparate treatment of the parties here puts form over substance. Although the status of the individual is significant, it is not controlling. It is the function of the act, not the title of the actor that determines the proper level of immunity available. *Harlow v. Fitzgerald*, 457 U.S. 800, 810, (1982) ("... in general our cases have followed a 'functional' approach to immunity law); *see Wood v. Strickland*, 420 U.S. 308, 322 (1975) (where this Court applied a function test in determining that a local school board would be entitled to only qualified immunity as they were applying disciplinary policy to a particular individual as opposed to legislating the policy). This Court has found immunity for legislators only when they are performing their legislative function. *See, e.g. Eastland v. United States Servicemen's Fund*,

421 U.S. 491, 95 S. Ct. 1813, 44 fl. Ed. 2d 324 (1975). And, for judges when they are performing an adjudicatory function. See, e.g. *Stump v. Sparkman*, 435 U.S. 349 (1978). Further, absolute immunity has been extended to the Executive Branch. And this extension has gone well beyond its application to the Presidency. *Nixon v. Fitzgerald*, 457 U.S. 731 (1982). Prosecutors and others similarly situated receive absolute immunity; as do executives who perform adjudicatory functions. *Butz, supra*. The extension of immunity here is premised on the acts, not the actor, for this Court has made clear that qualified immunity is the norm for executives. *Scheuer v. Rhodes*, 416 U.S. 232 (1974).

## II. LESS THAN ABSOLUTE IMMUNITY WILL SERIOUSLY IMPAIR A CITY'S ABILITY TO GOVERN.

The city is not arguing that an executive should receive absolute immunity for his or her executive actions, for the city recognizes that the greater power inherent in the Executive "affords a greater potential for a regime of lawless conduct." *Butz, supra*, 438 at 506. What the city is arguing is that where, as here, the Executive is merely playing a role in completing a quintessentially legislative process, he should be afforded the same protections given to the Legislature. This comports with the function analysis generally used by this Court. See *Gravel v. United States*, 408 U.S. 606, 625

(1972)("[S]enators and their aides were absolutely immune only when performing 'acts legislative in nature,' and not when taking other ~~acts~~ even 'in their official capacity.'"; See e.g. *Supreme Court of Virginia, supra*, 446 U.S. at 731-737(judges)).

This Court has seen fit to extend absolute immunity to Congress, to State Legislators, and to regional legislators. *Lake Country, supra*, 440 U.S. at 404 - 405. There is no sensible line of demarcation between a regional legislator and a municipal one. To suggest one, prompts the query, what liability would *Mr. Smith* have faced if he decided to legislate at home and not go to Washington?

If the premise that Congressmen need the protection of absolute immunity is sound, than its application to local legislators is equally sound. "Freedom of speech and action in the legislature [is] taken as a matter of course by those who severed the Colonies from the Crown and founded our Nation." *Tenney, supra*, 341 U.S. at 372. The city officials here come from a long state history of freedom of speech in the Legislature:

"In perhaps, the earliest American case to consider the import of the legislative privilege, the Supreme Judicial Court of Massachusetts, interpreting a provision of the Massachusetts Constitution granting the rights of freedom of speech and debate to state legislators, recognized that the privilege secured by it is not so much the privilege of the house as an organized body, as of each individual



member composing it, who is entitled to this privilege, even against the declared will of the house. For he does not hold this privilege at the pleasure of the house; but derives it from the will of the people ..."

*Spallone, supra* at 379, (quoting *Coffin v. Coffin*, 4 Mass. 1, 27 (1808)).

The Legislature and legislative acts can be untidy affairs, saddled with a fair degree of acrimony. This is no less so at the local level. See *Gorman Towers, Inc. v. Bogoslavsky*, 626 F. 2d, 606, 612(1980) ("Because municipal legislators are closer to their constituents than either their state or federal counterparts, they are, perhaps, the most vulnerable to and least able to defend lawsuits caused by the passage of legislation.")(quoting *Lagon v. Maryland*, 448 F. Supp. 935, 947 (D. Md. 1977)).

A local legislator and local legislative acts deserve the same protections afforded to those at the regional, at the state, and at the federal levels. To deny these protections here, given the rationale for their existence at the other levels, is to decide that local legislators are a lesser form of representative. It is to say that they are not only different in degree, but are also somehow different in kind. And, so different that even though they face the same perils as those on the regional, on the state, and on the federal level, they are to be separated from these groups and left to fend with what

has already been determined to be an insufficient level of protection for legislators: qualified immunity.

To now apply a literalist approach and determine that as the Speech or Debate Clause does not mention local legislators, they should not be given absolute immunity, is to call into question the precedent which exists for absolute immunity for acts outside Congress, and the absolute immunity for congressional aides. See *Harlow, supra*, 457 U.S. at 823. Further, the absence of express provisions regarding local legislators and the dearth of such early common law may be attributed to a very simple cause; "the paucity of early legal actions against local legislators for legislative acts was due to relatively few early local legislative bodies and undeveloped jurisprudence." *Bruce, supra*, 631 F. 2d at 277.

The logic that supports absolute immunity for local legislators applies equally well to a local executive performing legislative acts. As long as the act is legislative it does not matter who performs it. See *Lake Country, supra*, 440 U.S. at 404 - 405, (where a hybrid board of executive and legislative individuals were afforded absolute immunity).

The adoption of 42 U.S.C. 1983 did not abrogate common law legislative immunity. *Tenney, supra*, 371 U.S. at 377. While some may ask what becomes of the plaintiff if absolute immunity applies here. The city answers: the same thing that would happen to such a

plaintiff poised against a regional group, a state legislature, and Congress.

The City's interest in this case is simple: to ensure the proper operation of government. To that end, it requires the recognition that local legislators and local legislative acts need the protections afforded to other legislators. To promote free debate and the proper operation of government a legislator must act for the city's good, not for fear of his or her harm. To deny immunity is to encourage those acting legislatively to act with the narrow view of private monetary concerns, and not with the more appropriate focus - that of the public's needs. *Spallone, supra*, 493 U. S. at 280.

The First Circuit's opinion does not guide a City. To find that the passage of a municipal ordinance necessary to complete the budget process is not a legislative act, is to misperceive the legislative process. See Mass. Gen. L. Ann. ch. 43, sec. 55 (1994), Mass. Gen. L. Ann. ch 44 sec. 32 (1994). To further find that although absolute immunity was appropriate here, it was correctly applied post trial, is to misperceive the point of absolute immunity. Absolute immunity is to be raised at the earliest stages of litigation for the immunity is not just from any judgment, but from the burden of having to defend oneself. *Supreme Court of Va., supra*, 446 U.S. at 731-32, *Dombrowski, supra*, 387 U.S. at 85 ("legislators engaged in the sphere of legitimate legislative activity should be protected

not only from the consequences of litigation's results but also from the burden of defending themselves"). A city in the First Circuit is now instructed that the statutorily mandated passage of a municipal budget is not a legislative act. It is further instructed that if any of its elected officials wish to assert absolute immunity they may do so, but only after trial. This is no guidance at all.

But, most chilling to a City is the First Circuit's pronouncement that they have effectively eschewed a functions test in favor of a motivations test. A City can now look forward to discovery and litigation around the motivations of individual municipal officials. Justice Scalia, in a case involving different issues than those presented today opined on the futility of venturing to find the sole motivation of an individual legislator:

But the difficulty of knowing what vitiating purpose one is looking for is as nothing compared with the difficulty of knowing how or where to find it. For while it is possible to discern the objective "purpose" of a statute (i.e. the public good at which its provisions appear to be directed), or even the formal motivation for a statute where that is explicitly set forth (as it was, to no avail, here), discerning the subjective motivation of those enacting the statute is to be honest, almost always an impossible task. The number of possible motivations, to begin with, is not binary, or indeed even finite. In the present case, for example, a particular legislator need not have voted for the Act either because he wanted to foster religion or because he wanted to



improve education. He may have thought the bill would provide jobs for his district, or he may have wanted to make amends with a faction of his party he had alienated on another vote, or he may have been a close friend of the bill's sponsor, or he may have been repaying a favor he owed the Majority Leader, or he may have hoped the Governor would appreciate his vote and make a fundraising appearance for him, or he may have been pressured to vote for a bill he disliked by a wealthy contributor or by a flood of constituent mail, or he may have been seeking favorable publicity, or he may have been reluctant to hurt the feelings of loyal staff members who worked on the bill, or he may have been settling an old score with a legislator who opposed the bill, or he may have been mad at his wife who opposed the bill, or he may have been intoxicated and utterly *unmotivated* when the vote was called, or he may have accidentally voted "yes" instead of "no," or, of course, he may have had (and very likely did have) a combination of some of the above and many other motivations. To look for *the sole purpose* of even a single legislator is probably to look for something that does not exist.

*Edwards v. Aguillard*, 482 U.S. 578, 637 (1987)(Scalia, J., dissenting)

The First Circuit has now decided a case which calls into question a very basic tenet of our democracy. As Justice Frankfurter wrote, "it is not consonant with our scheme of government for a court to inquire in to the motives of legislators."

*Tenet*, 341 US at 377 (citing *Flatter*, 6 Crunch at 130). Individual motivations are irrelevant to an absolute immunity inquiry. *Id.*

Further, the First Circuit while claiming to give absolute immunity to municipal officials actually affords them a standard of qualified immunity and moreover, a qualified immunity that has a subjective standard. Effectively, the First Circuit has returned to the pre-*Harlow* standard. *Harlow v. Fitzgerald*, 457 U.S. 800 (1981). And, it did so contrary to the guidance of this Court. See *Dombrowski*, *supra*, 421 U.S. at 508-509, *Tenney*, 341 U.S. at 377.

When the Court last addressed this issue, it found absolute immunity for regional legislators. *Lake Country*, *supra*, 440 U.S. at 404-405. And, more recently, in *Spallone*, *supra*, 493 U.S., at 406, it reserved the question. *Lake Country* proves illustrative on two levels. One, it applied absolute immunity to regional legislators. And two, the regional legislative board that it applied absolute immunity to was a hybrid of legislative and executive members. This case is the logical next step to *Lake Country*. Since *Lake Country*, the Courts of Appeals have unanimously held that local legislators are entitled to absolute legislative immunity." See, e.g., *Fry v. Board of City Commissioners*, 7 F. 3d 936, 942 (10th Cir, 1993); *Acevedo-Cordero v. Cordero-Santiago*, 958 F. 2d 20, 22 (1st Cir. 1992); *Goldberg v. Rocky Hill*, 973 F. 2d 70 (2d. Cir. 1992)(dicta); *Gross v. Winter*, 876 F. 2d 165, 169 (D.C.Cir. 1989);

*Haskell v. Washington Township*, 864 F. 2d 1266, 1277 (6th Cir. 1988); *Aitchison*, 708 F. 2d at 98-99; <sup>3</sup>*Reed v. Shorewood*, 704 F. 2d 943, 952-953 (7th Cir. 1983); *Espanola Way Corp. v. Meyerson*, 690 F. 2d 827, 829 (11th Cir. 1982), *cert denied*, 460 U.S. 1039 (1983); *Kuzinich v. County of Santa Clara*, 689 F. 2d 1345, 1349-1350 (9th Cir. 1982); *Hernandez v. Lafayette*, 643 F. 2d 272, 274-280 (5th Cir. 1980), *cert. denied*, 455 U.S. 907 (1982); *Bruce v. Riddle*, 631 F. 2d 272, 279 (3rd Cir. 1980); *Gorman Towers, Inc. v. Bogoslavsky*, 626 F. 2d 607, 611-614 (8th Cir. 1980). That it is the rule in the circuits that absolute immunity is afforded local legislators for their legislative acts supports the City's position. SHELDON H. NAHMOD, Civil Rights and Civil Liberties Litigation, 14 (1991).

Without clear, sensible guidelines a City's democracy is distorted. The ramifications are serious, particularly given the impact they will have on the City's budget. "Ordering budget priorities is a complex process subject to many pressures and resulting in many compromises. Budgets are written to the clangor of many axes grinding ... Each line item in a budget may affect the interests of a few people intensely, but a budget expresses general policy by balancing the competing claims of hundreds of thousands

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<sup>3</sup> In *Aitchison*, a case factually similar to this one, the Court found that the mayor could exercise legislative powers along with his traditional executive duties. *Aitchison* at 99.

of line items." *Rateree v. Rockett*, 630 F. Supp. 763, 771 (N.D. Ill. 1986), *aff'd*, 852 F. 2d 946 (7th Cir. 1988). Given the First Circuit's decision it is not unreasonable to believe that any intelligent, qualified individual would think better of seeking elective office. *Harlow, supra*, 457 U.S. at 817. Municipal office should be sought by more than just the judgment proof.

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### CONCLUSION

For the foregoing reasons, the Amicus Curiae respectfully requests that this Court hold that local officials are entitled to absolute immunity for those actions that are quintessentially legislative. The Amicus Curiae respectfully requests that the judgments against these individual defendants be reversed and vacated.



Dated: August 12, 1997

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AUG 14 1997

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1996

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DANIEL BOGAN AND MARILYN RODERICK,  
*Petitioners,*

v.

JANET SCOTT-HARRIS,  
*Respondent.*

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On Writ of Certiorari to the  
United States Court of Appeals  
for the First Circuit

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BRIEF OF THE  
NATIONAL LEAGUE OF CITIES,  
COUNCIL OF STATE GOVERNMENTS,  
U.S. CONFERENCE OF MAYORS,  
NATIONAL ASSOCIATION OF COUNTIES,  
INTERNATIONAL CITY/COUNTY  
MANAGEMENT ASSOCIATION,  
AND INTERNATIONAL MUNICIPAL  
LAWYERS ASSOCIATION  
AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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## QUESTIONS PRESENTED

*Amici* will address the following questions:

1. Whether individual members of a local legislative body are entitled to absolute immunity from liability under 42 U.S.C. § 1983 for actions taken in a legislative capacity.
2. Whether local legislators act in a legislative capacity when they propose or vote on municipal legislation.

## TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED .....	i
TABLE OF AUTHORITIES .....	iv
INTEREST OF THE <i>AMICI CURIAE</i> .....	1
STATEMENT .....	2
SUMMARY OF ARGUMENT .....	6
ARGUMENT .....	8
LOCAL LEGISLATORS ARE ENTITLED TO ABSOLUTE IMMUNITY FOR ENACTING A MUNICIPAL ORDINANCE .....	8
A. Individual Legislators Are Entitled To Absolute Immunity From Liability Under 42 U.S.C. § 1983 For Actions Taken In A Legislative Capacity....	9
B. Legislators Act In Their Legislative Capacity When They Propose Or Vote On Municipal Legislation.....	21
CONCLUSION .....	30



## TABLE OF AUTHORITIES

Cases	Page
<i>Acevedo-Cordero v. Cordero-Santiago</i> , 958 F.2d 20 (1st Cir. 1992) .....	20, 27
<i>Aitchison v. Raffiani</i> , 708 F.2d 96 (3d Cir. 1983) .....	19, 20, 25
<i>Alexander v. Holden</i> , 66 F.3d 62 (4th Cir. 1995) .....	25
<i>Bradley v. Fisher</i> , 80 U.S. (13 Wall.) 335 (1872) ..	9
<i>Briscoe v. LaHue</i> , 460 U.S. 325 (1983) .....	9
<i>Bruce v. Riddle</i> , 631 F.2d 273 (4th Cir. 1980) .....	20
<i>Buell v. Ball</i> , 20 Iowa 282 (1866) .....	11
<i>Burtneck v. McLean</i> , 76 F.3d 611 (4th Cir. 1996) ..	24
<i>Butz v. Economou</i> , 438 U.S. 478 (1978) .....	18, 19
<i>Carver v. Foerster</i> , 102 F.3d 96 (3d Cir. 1996) .....	25
<i>City of Newport v. Fact Concerts, Inc.</i> , 453 U.S. 247 (1981) .....	9, 10
<i>County Comm'rs of Anne Arundel v. Duckett</i> , 20 Md. 468 (1863) .....	<i>passim</i>
<i>Cutting v. Muzzey</i> , 724 F.2d 259 (1st Cir. 1984) ..	<i>passim</i>
<i>Ditch v. Board of County Comm'rs</i> , 650 F. Supp. 1245 (D. Kan. 1986), <i>amended on other grounds</i> , 699 F. Supp. 1553 (D. Kan. 1987) .....	25
<i>Doe v. McMillan</i> , 412 U.S. 306 (1973) .....	24
<i>Drayton v. Mayor &amp; Council of Rockville</i> , 699 F. Supp. 1155 (D. Md. 1988), <i>aff'd</i> , 885 F.2d 864 (4th Cir. 1989) .....	25
<i>Dusanenko v. Maloney</i> , 560 F. Supp. 822 (S.D.N.Y. 1983), <i>aff'd</i> , 726 F.2d 82 (2d Cir. 1984) .....	25
<i>Eastland v. United States Servicemen's Fund</i> , 421 U.S. 491 (1975) .....	17, 23-24, 24
<i>Espanola Way Corp. v. Meyerson</i> , 690 F.2d 827 (11th Cir. 1982), <i>cert. denied</i> , 460 U.S. 1039 (1983) .....	21
<i>Ex Parte the Mayor of Albany</i> , 23 Wend. 277 (N.Y. 1840) .....	11
<i>Finch v. City of Vernon</i> , 877 F.2d 1497 (11th Cir. 1989) .....	25
<i>Freeport v. Marks</i> , 59 Penn. St. 253 (1868) .....	11, 12, 13, 14
<i>Fry v. Board of County Comm'rs</i> , 7 F.3d 936 (10th Cir. 1993) .....	21

## TABLE OF AUTHORITIES—Continued

	Page
<i>Goldberg v. Town of Rocky Hill</i> , 973 F.2d 70 (2d Cir. 1992) .....	20
<i>Goldberg v. Village of Spring Valley</i> , 538 F. Supp. 646 (S.D.N.Y. 1982) .....	25-26
<i>Gorman Towers v. Bogoslavsky</i> , 626 F.2d 607 (8th Cir. 1980) .....	<i>passim</i>
<i>Gravel v. United States</i> , 408 U.S. 606 (1972) .....	7, 23, 24
<i>Gross v. Winter</i> , 876 F.2d 165 (D.C. Cir. 1989) .....	21, 25
<i>Harlow v. Fitzgerald</i> , 457 U.S. 800 (1982) .....	26, 28
<i>Haskell v. Washington Township</i> , 864 F.2d 1266 (6th Cir. 1988) .....	20
<i>Herbst v. Daukas</i> , 701 F. Supp. 964 (D. Conn. 1988) .....	25
<i>Hernandez v. City of Lafayette</i> , 643 F.2d 1188 (5th Cir. 1981), <i>cert. denied</i> , 455 U.S. 907 (1982) .....	20
<i>Hill v. The Board of Aldermen of the City of Charlotte</i> , 72 N.C. 63 (1875) .....	12
<i>Imbler v. Pachtman</i> , 424 U.S. 409 (1976) .....	9, 10
<i>Jones v. Loving</i> , 55 Miss. 109 (1877) .....	13
<i>Kilbourn v. Thompson</i> , 103 U.S. 168 (1881) .....	23-24, 24
<i>Kuznich v. County of Santa Clara</i> , 689 F.2d 1345 (9th Cir. 1982) .....	21
<i>Lake Country Estates, Inc. v. Tahoe Regional Planning Agency</i> , 440 U.S. 391 (1979) .....	<i>passim</i>
<i>Lough v. City of Esterville</i> , 122 Iowa 479 (1904) ..	14
<i>Malley v. Briggs</i> , 475 U.S. 335 (1986) .....	9
<i>McHenry v. Sneer</i> , 56 Iowa 649 (1881) .....	14
<i>Mitchell v. Forsyth</i> , 472 U.S. 511 (1985) .....	26, 27
<i>Morris v. People</i> , 3 Denio 381 (N.Y. 1846) .....	11
<i>Owen v. City of Independence</i> , 445 U.S. 622 (1980) .....	9, 19, 20
<i>Pierson v. Ray</i> , 386 U.S. 547 (1967) .....	16
<i>Powell v. McCormack</i> , 395 U.S. 486 (1969) .....	24
<i>Rabkin v. Dean</i> , 856 F. Supp. 543 (N.D. Cal. 1994) .....	25
<i>Racine v. Cecil County</i> , 843 F. Supp. 53 (D. Md. 1994) .....	25
<i>Rateree v. Rockett</i> , 852 F.2d 946 (7th Cir. 1988) ..	18, 25
<i>Reed v. Village of Shorewood</i> , 704 F.2d 943 (7th Cir. 1983) .....	20

## TABLE OF AUTHORITIES—Continued

	Page
<i>Richardson v. McKnight</i> , 117 S. Ct. 2100 (1997) ....	9
<i>Scheuer v. Rhodes</i> , 416 U.S. 232 (1974) .....	9
<i>Shoultes v. Laidlaw</i> , 886 F.2d 114 (6th Cir. 1989) ..	18, 19
<i>Supreme Court of Virginia v. Consumers Union</i> , 446 U.S. 719 (1980) .....	17, 23, 27
<i>Tenney v. Brandhove</i> , 341 U.S. 367 (1951) .....	<i>passim</i>
<i>Tower v. Glover</i> , 467 U.S. 914 (1984) .....	9, 15
<i>United States v. Johnson</i> , 383 U.S. 169 (1966) .....	23
<i>United States v. Brewster</i> , 408 U.S. 501 (1972) .....	24
<i>Villavaso v. Barthet</i> , 1 So. 599 (La. 1887) .....	14
<i>Wells v. Atlanta</i> , 43 Geo. 67 (1871) .....	11
<i>Wilson v. New York</i> , 1 Denio 595 (N.Y. 1845) ..	11, 12, 15
<i>Wyatt v. Cole</i> , 504 U.S. 158 (1992) .....	9

## Statutes

42 U.S.C. § 1983 .....	<i>passim</i>
------------------------	---------------

## Miscellaneous

J. BISHOP, COMMENTARIES ON THE NON-CONTRACT LAW AND ESPECIALLY AS TO COMMON AFFAIRS NOT OF CONTRACT OR THE EVERY-DAY RIGHTS AND TORTS (1889) .....	11
Cong. Globe, 42nd Cong., 1st Sess. (1871) .....	16
T. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT (1880) .....	10-11, 11, 14-15
J. DILLON, COMMENTARIES ON THE LAW OF MU- NICIPAL CORPORATIONS (3d ed. 1881) .....	12
Hitt, <i>Special Tax Breaks Appear, and May Face Veto</i> , WALL ST. J., Aug. 1, 1997 .....	26
F. MECHEM, A TREATISE ON THE LAW OF PUBLIC OFFICES AND OFFICERS (1890) .....	11-12

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1996

No. 96-1569

DANIEL BOGAN AND MARILYN RODERICK,  
v. *Petitioners*,

JANET SCOTT-HARRIS,  
*Respondent*.

On Writ of Certiorari to the  
United States Court of Appeals  
for the First Circuit

BRIEF OF THE  
NATIONAL LEAGUE OF CITIES,  
COUNCIL OF STATE GOVERNMENTS,  
U.S. CONFERENCE OF MAYORS,  
NATIONAL ASSOCIATION OF COUNTIES,  
INTERNATIONAL CITY/COUNTY  
MANAGEMENT ASSOCIATION,  
AND INTERNATIONAL MUNICIPAL  
LAWYERS ASSOCIATION  
AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*

*Amici* are organizations whose members include state and local governments and officials throughout the United States. They have a compelling interest in the issue presented here: whether, and in what circumstances, local legislators are entitled to absolute immunity for acts taken in their legislative capacity in suits under 42 U.S.C. § 1983.



*Amici* and their members will be directly affected by the Court's resolution of the issue presented in this case; exposure to liability for legislative decision-making inevitably would have a significant impact both on individual legislative officers and on the municipalities they serve. At the same time, *amici* have unique experience with the practicalities of the local legislative process. *Amici* therefore submit this brief to assist the Court in the resolution of this case.<sup>1</sup>

#### STATEMENT

1. Respondent Janet Scott-Harris, an African-American woman, was employed as the administrator of the Department of Health and Human Services ("DHHS") of the City of Fall River, Massachusetts. During the course of her tenure as DHHS administrator, respondent performed well but experienced continuing conflict with another city employee, Dorothy Biltcliffe. Respondent filed a complaint against Biltcliffe in October 1990 complaining about the latter's racially offensive remarks. Pet. App. 39-40. Biltcliffe responded by pressing her case with several city and state officials, including petitioner Marilyn Roderick, a city councillor and the chair of the City Council's ordinance committee. Before the hearing on respondent's charges, the parties accepted a settlement in which Biltcliffe was suspended without pay for sixty days. The punishment subsequently was reduced by petitioner Daniel Bogan, the City's mayor. *Id.* at 40.

In January 1991, in preparation for the 1992 Fiscal Year Budget, Mayor Bogan proposed a series

<sup>1</sup> The parties' letters of consent to the filing of this brief have been filed with the Clerk pursuant to Rule 37.2 of the Rules of this Court.

of cuts in the City's budget as a response to an anticipated decline in aid from the State. Pet. App. 40. Mayor Bogan proposed eliminating DHHS (and with it, respondent's job); his budget also unfunded or eliminated 134 other city positions, resulting in the actual termination of twenty-seven city employees. *Id.* at 8. In addition, the budget froze the salaries of all city employees. The city council ordinance committee chaired by Ms. Roderick subsequently reported out an ordinance eliminating DHHS. Shortly thereafter, the City Council approved the ordinance by a vote of 6-2, Ms. Roderick voting with the majority. *Id.* at 41. Mayor Bogan signed the ordinance into law. *Ibid.*

2. Invoking 42 U.S.C. § 1983, respondent then brought this action in the United States District Court for the District of Massachusetts against the City, Mayor Bogan, Ms. Roderick, and other city councillors.<sup>2</sup> Respondent alleged that, in enacting the ordinance that eliminated her position, the defendants had (1) discriminated against her on the basis of race; and (2) retaliated against her for filing the complaint against Ms. Biltcliffe in violation of the First Amendment. The district court denied the individual defendants' motions to dismiss on the grounds of absolute legislative immunity, reserving the issue until after trial. J.A. 71-74. After a nine-day trial, the jury found that there had been no racial discrimination, but that respondent's protected speech was a substantial motivating factor in the City Council's decision to enact the ordinance. The City was held

<sup>2</sup> The claims against the other city councillors were dismissed by joint stipulation. J.A. 66-70. The remaining defendant, the city administrator, was granted a directed verdict at trial. *Id.* at 133-136.

liable, and Mayor Bogan and Ms. Roderick were found personally liable on the ground that they had acted maliciously or with reckless indifference to respondent's rights. The district court then rejected the individual defendants' assertion of absolute legislative immunity, holding that immunity was unavailable because "the ordinance amendment passed by the city council was an individually-targeted administrative act, rather than a neutral, legislative elimination of a position which incidentally resulted in the termination of plaintiff." Pet. App. 20.

The court of appeals affirmed the judgment against the individual defendants, but set aside the verdict against the City. Pet. App. 34-74. So far as the individual defendants were concerned, the court noted that "lawmakers have absolute immunity from civil liability for damages arising out of their performance of legitimate legislative activities." *Id.* at 63. The court went on to hold, however, that "legislators are not immune with respect to all actions that they take. The dividing line is drawn along a functional axis that distinguishes between legislative and administrative acts." *Id.* at 64. The court offered two related tests for separating these acts from one another:

The first test focuses on the nature of the facts used to reach the given decision. If the underlying facts on which the decision is based are "legislative facts," such as "generalizations concerning a policy or state of affairs," then the decision is legislative. If the facts used in the decision making are more specific, such as those that relate to particular individuals or situations, then the decision is administrative. The second test focuses on "the particularity of the impact of the state of action." If the action involves establishment of a general policy, it is legislative; if

the action "single[s] out specifiable individuals and affect[s] them differently from others," it is administrative.

*Id.* at 64-65, quoting *Cutting v. Muzzey*, 724 F.2d 259, 261 (1st Cir. 1984).

Applying this test, the court went on to conclude that "[w]hen the material facts are genuinely disputed, \* \* \* the question is properly treated as a question of fact, and its disposition must await the trial." Pet. App. 65. And the court found that "here, conflicted evidence as to the defendants' true motives raised genuine issues of material fact." Focusing on the jury's conclusion that respondent's "constitutionally sheltered speech was a substantial or motivating factor in the actions which Roderick and Bogan took vis-a-vis the ordinance," the court reasoned that "[t]hese findings reflect the jury's belief that the individual defendants relied on facts relating to a particular individual—Scott-Harris—in the decision-making calculus." *Id.* at 66. In the court's view, enactment of the ordinance therefore "constituted an administrative rather than a legislative act." *Ibid.* See *id.* at 70 (immunity unavailable because evidence supported finding "that the desire to punish the plaintiff for her protected speech was a substantial or motivating factor" in Roderick's and Bogan's actions).

On the other hand, the court found that the City could not be held liable. The court explained that respondent offered evidence of improper motive as to no more than two of the six City Council members who supported the ordinance. See Pet. App. 60-61. The court also noted that "[n]othing suggests that the City Council deviated from its standard protocol when it received and enacted the ordinance that



abolished the plaintiff's job." *Id.* at 62. In these circumstances, the court held that it could not "rest municipal liability on so frail a foundation." *Id.* at 63.

#### SUMMARY OF ARGUMENT

A. This Court has recognized that government officials are entitled to immunity in actions brought under Section 1983 if there is a common law counterpart to the privilege asserted and the immunity sought is consistent with the statutory purposes. Under that test, municipal legislators plainly may claim absolute immunity for actions taken in their legislative capacity. At the time of Section 1983's enactment in 1871, it was a settled principle of common law that local legislators were entitled to absolute immunity for all discretionary actions that had a legislative character. In these circumstances, immunity is presumptively available under the statute: it is hardly likely "that Congress—itself a staunch advocate of legislative freedom—would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language [of Section 1983]." *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951).

Nor is there anything in the history or purposes of Section 1983 to counsel against recognition of absolute immunity for local legislators. To the contrary, the considerations that impelled the Court to accord such immunity to state and regional legislators apply with full force here. The Court has noted that, absent immunity from civil liability, state and regional (and, for that matter, federal) legislators would be cowed in the performance of their duties; that legislators would be distracted by having to engage in time-consuming and burdensome litigation; and that these considerations ultimately would discourage citizens

from undertaking government service. Precisely the same thing is true of municipal legislators. In these circumstances, there is a manifest "need for immunity to protect the 'public good.'" *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 404-405 (1979).

B. The First Circuit's test for determining the availability of legislative immunity—which provides that legislators may not assert immunity when the motivations for or effects of an ordinance supported by the legislators are insufficiently broad—is insupportable. Local legislators act in their legislative capacity, and therefore are entitled to absolute immunity under Section 1983, *whenever* they propose or vote on municipal legislation. That conclusion follows from *Tenney*, which held that absolute immunity comes into play so long as the challenged action was "an established part of representative government." 341 U.S. at 377. And it is confirmed by the Court's decisions under the Constitution's Speech and Debate Clause, which have uniformly held that voting and other acts performed in the course of enacting legislation are "within the 'sphere of legitimate legislative activity.'" *Gravel v. United States*, 408 U.S. 606, 624 (1972), quoting *Tenney*, 341 U.S. at 376.

The court of appeals' attempt to look behind the form of the legislation also is manifestly inconsistent with the purposes of legislative immunity. The various policies that underlie the immunity doctrine have clear application to all legislation, whether or not the enactment applies to a narrow subject or to a limited number of people. Indeed, the First Circuit's approach would render the protections of the immunity doctrine largely nugatory. The court held that a trial is necessary whenever there is conflicting evidence

about "the defendants' true motives." Pet. App. 65. But that requirement confuses the immunity inquiry with determination of the merits of the plaintiff's claim; it entirely defeats the purpose of immunity, which is "of little value if [legislators] could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader." *Tenney*, 341 U.S. at 377.

### ARGUMENT

#### LOCAL LEGISLATORS ARE ENTITLED TO ABSOLUTE IMMUNITY FOR ENACTING A MUNICIPAL ORDINANCE

The court of appeals properly recognized that municipal legislators are entitled to absolute immunity for actions undertaken in their legislative capacity. Such an immunity is firmly grounded in the common law, is essential to the sound working of municipal government, and is compelled by the logic of this Court's decisions allowing the assertion of immunity in closely related settings. But the court below—perhaps influenced by the rather idiosyncratic view that "great cities [are] 'pestilential to the morals, the health, [and] the liberties of man'" (Pet. App. 37 (citation omitted))—surely hopped the track in its further conclusion that immunity must be denied when there is a disputed issue of fact about whether the legislator-defendants' acts were prompted by an improper motivation. That approach, which finds no basis either in history or in this Court's decisions, would render legislative immunity largely illusory. It should be rejected.

#### A. Individual Legislators Are Entitled To Absolute Immunity From Liability Under 42 U.S.C. § 1983 For Actions Taken In A Legislative Capacity

This Court has not yet had occasion to resolve the question whether individuals performing legislative functions at the local level are entitled to absolute immunity from suit under 42 U.S.C. § 1983. *See Lake Country Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391, 404 n.26 (1979). The test that the Court uses to resolve immunity questions, however, is familiar. The Court's

initial inquiry is whether an official claiming immunity under § 1983 can point to a common-law counterpart to the privilege he asserts. \* \* \* If "an official was accorded immunity from tort actions at common law when the Civil Rights Act was enacted in 1871, the court next considers whether § 1983's history or purposes nonetheless counsel against recognizing the same immunity in § 1983 actions."

*Malley v. Briggs*, 475 U.S. 335, 339-340 (1986), quoting *Tower v. Glover*, 467 U.S. 914 (1984).<sup>3</sup> Applying this test in areas closely related to the one here, the Court has held that both state and regional legislators may claim such an immunity. *Tenney v. Brandhove*, 341 U.S. 367 (1951); *Lake Country Estates*, 440 U.S. at 403-406. *See also Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1872) (absolute judicial immunity); *Imbler v. Pachtman*, 424 U.S. 409 (1976) (absolute prosecutorial immunity). The

<sup>3</sup> *Accord, e.g., Richardson v. McKnight*, 117 S.Ct. 2100 (1997); *Wyatt v. Cole*, 504 U.S. 158 (1992); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981); *Briscoe v. LaHue*, 460 U.S. 325 (1983); *Owen v. City of Independence*, 445 U.S. 622 (1980); *Scheuer v. Rhodes*, 416 U.S. 232 (1974).



same conclusion should apply in this case: common law history and legislative policy both mandate absolute immunity for local legislators.

1. In determining questions of immunity under Section 1983, the Court has been guided by the "important assumption \* \* \* that members of the 42nd Congress were familiar with common-law principles, including defenses previously recognized in ordinary tort litigation, and that they likely intended these common-law principles to obtain, absent specific provisions to the contrary." *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981). As a consequence, the first step in resolving an immunity claim is a "considered inquiry into the immunity historically accorded to the relevant official at common law." *Imbler*, 424 U.S. at 421. And here, the answer to that inquiry is plain: by 1871, it was a settled principle of common law that local legislators acting in their legislative capacities could claim absolute immunity.

The general view was stated in Cooley's influential treatise, which was written shortly after the enactment of Section 1983 and described authorities that predated the Civil Rights Act:

*If we take the case of legislative officers, their rightful exemption from liability is very plain.*

\* \* \* The legislature has full discretionary authority in all matters of legislation, and it is not consistent with this that the members should be called to account at the suit of individuals for their acts and neglects. Discretionary power is, in its nature, independent; to make those who wield it liable to be called to account by some other authority is to take away discretion and

destroy independence. *This remark is not true, exclusively, of legislative bodies proper, but it applies also to inferior legislative bodies, such as boards of supervisors, county commissioners, city councils, and the like.*

T. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT 376 (1880) (emphasis added).<sup>4</sup>

Other nineteenth century authors likewise treated this principle as established law. "It is in the nature of a legislative power" that legislators cannot "be compelled to pay damages to one aggrieved either by their legislating or their declining to legislate. Therefore a person who has suffered from the non-existence of a municipal by-law, or from the enactment of an injurious one \* \* \* can have no remedy against \* \* \* [the] officers." J. BISHOP, COMMENTARIES ON THE NON-CONTRACT LAW AND ESPECIALLY AS TO COMMON AFFAIRS NOT OF CONTRACT OR THE EVERY-DAY RIGHTS AND TORTS § 744 (1889), citing *County Comm'rs of Anne Arundel v. Duckett*, 20 Md. 468 (1863); *Ex Parte the Mayor of Albany*, 23 Wend. 277 (N.Y. 1840). See also F. MECHEM, A TREATISE ON THE LAW OF PUBLIC OFFICES AND OFFICERS §§ 644, 646 (1890) ("[T]he rule is well settled that a public legislative officer is not liable to individuals for his

<sup>4</sup> In support of this statement of law, Cooley cited to several cases decided prior to the enactment of Section 1983, including *Freeport v. Marks*, 59 Penn. St. 253 (1868); *Buell v. Ball*, 20 Iowa 282 (1866); *Morris v. People*, 3 Denio 381 (N.Y. 1846); and *Wilson v. New York*, 1 Denio 595 (N.Y. 1845). Referring to *Wells v. Atlanta*, 43 Geo. 67 (1871), Cooley stated that "even the allegation of fraud cannot be listened to for the purpose of establishing such a liability." COOLEY, *supra*, at 377 n.1.

legislative action. . . . This immunity is not confined to members of national and state legislatures, but extends to the protection of members of \* \* \* city councils.”), citing *County Comm’rs of Anne Arundel*, 20 Md. 468; *Freeport v. Marks*, 59 Penn. St. 253 (1868); 1 J. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS 274 (3d ed. 1881) (“Courts will not, in general, inquire into the *motives of members* of the council in passing ordinances.”) (emphasis in original).

Not surprisingly, the nineteenth century cases bear out the observations of the treatises. A typical decision is *Wilson v. New York*, 1 Denio 595 (N.Y. 1845), which held that individual New York City aldermen were immune from suit because they had been acting in a legislative rather than a ministerial capacity:

The civil remedy for misconduct in office is more restricted and depends exclusively upon the nature of the duty which has been violated. Where [that duty is] ministerial \* \* \* the delinquent officer is bound to make full redress \* \* \* but \* \* \* if his powers are discretionary \* \* \* he is exempt from all responsibility by action for the motives which influence him, and the manner in which such duties are performed. If corrupt, he may be impeached or indicted, but the law will not tolerate an action to redress the individual wrong which may have been done. These principles are too familiar and well settled to require illustration or authority, and in my view of the present question they govern and control it.

*Id.* at 599-600. Accord, e.g., *Hill v. The Board of Aldermen of the City of Charlotte*, 72 N.C. 63, 65 (1875) (quoting *Wilson*, 1 Denio at 595); *County*

*Comm’rs of Anne Arundel*, 20 Md. at 477, 479 (if the acts of the county commissioners were within their “legislative discretion \* \* \* [then] they had the liberty of exercising [that discretion] as their sense of duty to their constituents dictated, without coercion or liability”; with regard to legislative power “[t]here is not that precision and certainty of duty, that ought to make them responsible to individuals, to any extent and for any damage”).

Similarly, in *Jones v. Loving*, 55 Miss. 109 (1877), several city council members were sued individually on the claim that the passage of a specific ordinance was both unlawful and malicious in character. The plaintiff argued that the court should inquire into the motives of the city council members and thus apply only a qualified immunity standard. The defendant city council members replied by arguing that “no reported case be found in which \* \* \* the officers of a municipal corporation[] were sued for legislative acts, whether they were unconstitutional, oppressive, malicious or corrupt.” *Id.* at 110. The court agreed, stating that “it is impossible to perceive upon what theory such a suit can be maintained. \* \* \* [I]ndividual members of [the city council] cannot be made personally liable for a mistaken exercise of their powers; nor is it possible to inquire into the motives which prompted their action.” *Id.* at 111 (citing *Freeport v. Marks*, 59 Penn. St. at 253). The court added that “[w]henver the officers of a municipal corporation are vested with legislative powers, they hold and exercise them for the public good, and are clothed with all the immunities of government, and are exempt from all liability for their mistaken use.”



*Ibid.* (citing *County Commissioners of Anne Arundel*, 20 Md. at 469).<sup>5</sup>

The common law permitted a cause of action against municipal legislators in only one circumstance: when they neglected to perform duties that were "ministerial," rather than "discretionary," in character. As Cooley explained:

When such [legislative] bodies neglect and refuse to proceed to the discharge of their duties, the courts \* \* \* cannot \* \* \* impose the payment of damages upon them. \* \* \* It is only when some particular duty of a ministerial character is imposed upon a legislative body in the performance of which its members severally are required to act—*no liberty of action being allowed, and no discretion*—that there can be a private action for neglect. Such ministerial duties are sometimes imposed upon the members of

<sup>5</sup> Other decisions from the decades after enactment of Section 1983 treat the principle of absolute legislative immunity as long-established and generally recognized. See, e.g., *Villavaso v. Barthet*, 1 So. 599, 607 (La. 1887) ("From numerous respectable judicial authorities \* \* \* [comes] the following principle: 'When the officers of a municipal corporation are invested with legislative powers, they are exempt from individual liability for the passage of an ordinance within that authority, and their motives in reference thereto will not be inquired into.'"); *McHenry v. Sneer*, 56 Iowa 649 (1881) (suit against individual council members for enacting or failing to enact ordinance not permitted); *Lough v. City of Esterville*, 122 Iowa 479, 485 (1904) ("It has always been the law that a public officer who acts either in a judicial or legislative capacity cannot be held to respond in damages on account of any act done by him in his official capacity. \* \* \* [H]e cannot be mulcted in damages. This conclusion has the support of all the adjudged cases.").

subordinate boards, like supervisors and county commissioners, and when they are, if they are imposed for the benefit of individuals, the members may be personally responsible for failure in performance.

COOLEY, *supra*, at 377 (emphasis added). This doctrine had a very limited scope, coming into play only when the legislature refused to fulfill "a duty \* \* \* imposed by statute" (*County Comm'rs of Anne Arundel*, 20 Md. at 478) and where that statutory duty was "absolute, certain and imperative." *Wilson*, 1 Denio at 599. In contrast, immunity was unchallenged when, as in this case, the legislator's action was "discretionary, to be exerted or withheld, according to [the legislator's] own view of what is necessary." *Ibid.*

Against this background, it is manifest that the tradition of immunity from liability for discretionary acts taken in a legislative capacity by local legislators was recognized by the common law at the time Section 1983 was enacted. In these circumstances, immunity is presumptively available under the statute: it is difficult to "believe that Congress—*itself a staunch advocate of legislative freedom*—would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language [of Section 1983]." *Tenney*, 341 U.S. at 376.

2. The second element of the Court's inquiry asks whether, notwithstanding this settled common law immunity, "§ 1983's history or purposes nonetheless counsel against recognizing the same immunity in § 1983 actions." *Tower*, 467 U.S. at 920. There is no such reason for hesitation here. Nothing in the

legislative history of the statute suggests that, in enacting § 1 of the Civil Rights Act of 1871, the 42nd Congress intended to override municipal legislators' common law immunity.<sup>\*</sup> In fact, the only history on point is to the contrary: Senator Thurman commented that if a legislator were "sued because he voted for a law \* \* \* such a liability would be utterly destructive of the freedom of thought and action that are indispensable to the proper discharge of legislative duties." Cong. Globe, 42nd Cong., 1st Sess., app. 217 (1871). And because Congress surely "would have specifically so provided had it wished to abolish" an important common law immunity existing in 1871 (*Pierson v. Ray*, 386 U.S. 547, 555 (1967)), the silence of the legislative record suggests that absolute immunity for local legislators is consistent with the purposes of § 1983.

Equally as important, the considerations that impelled the Court to recognize absolute immunity for state and regional legislators—considerations grounded both in "the presuppositions of our political history" (*Tenney*, 341 U.S. at 372) and in a recognition of "the need for immunity to protect the 'public good'" (*Lake Country Estates*, 440 U.S. at 404-

<sup>\*</sup> See generally Cong. Globe, 42nd Cong., 1st Sess., 749, 804 (1871) (conference reports) (hereinafter *Globe*); *Globe* 334 (Rep. Hoar); *Globe* 365-366 (Rep. Arthur); *Globe* 385 (Rep. Lewis); *Globe* 477 (Rep. Dawes); *Globe* 568-569 (Sen. Edmunds); *Globe* 805 (exchange between Rep. Willard and Rep. Shellabarger); *Globe* app. 67-68 (Rep. Shellabarger (introduction of bill)); *Globe* app. 80 (Rep. Perry); *Globe* app. 84-85 (Rep. Bingham); *Globe* app. 86 (Rep. Storm); *Globe* app. 91-92 (Rep. Duke); *Globe* app. 153 (Rep. Garfield); *Globe* app. 217 (Sen. Thurman); *Globe* app. 241 (Sen. Bayard).

405)—apply with full force here. The Court has explained that absolute immunity is designed to "insure that the legislative function may be performed independently without fear of outside interference." *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 731 (1980) (citation omitted). Such immunity also assures that legislators are not diverted from their public duties; "[a] private civil action, whether for an injunction or damages, creates a distraction and forces [legislators] to divert their time, energy, and attention from their legislative tasks to defend the litigation." *Id.* at 733, quoting *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975). When recognizing absolute legislative immunity for regional legislators in *Lake Country Estates*, the Court accordingly noted that:

"[l]egislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence, but for the public good. One must not expect uncommon courage even in legislators. \* \* \* The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives."

440 U.S. at 405, quoting *Tenney*, 341 U.S. at 377.

Precisely the same considerations apply to municipal legislators. Indeed, Justice Marshall, dissenting in *Lake Country Estates*, recognized that there is

little room to argue that municipal legislators stand on a different footing than their regional counterparts. Surely the Court's supposition that the "cost and inconvenience and distractions of



a trial" will impede officials in the "uninhibited discharge of their legislative duty" \* \* \* applies with equal force whether the officials occupy local or regional positions.

*Id.* at 408 (citation omitted). And the courts of appeals, without exception, have agreed that "[t]here is no material distinction between the need to insulate legislators at the national level to protect the public good, \* \* \* and the same need at the local level." *Rateree v. Rockett*, 852 F.2d 946, 949 (7th Cir. 1988) (citation omitted).<sup>7</sup>

Indeed, immunity here follows necessarily from *Lake Country Estates*. Without looking to the specific history of common law immunities for regional legislators, the Court held that "to the extent the evidence discloses that these individuals were acting in a capacity comparable to that of members of a state legislature, they are entitled to absolute immunity from federal damages liability." 440 U.S. at 406. The Court went on to state that:

[t]his holding is supported by the analysis in *Butz v. Economou*, 438 U.S. 478 [(1978)], which recognized absolute immunity for individuals performing judicial and prosecutorial functions within the Department of Agriculture. In that case, we rejected the argument that absolute immunity should be denied because the in-

<sup>7</sup> See also *Shoultes v. Laidlaw*, 886 F.2d 114, 117 (6th Cir. 1989) ("[T]he rationale which undergirds state legislative immunity applies with equal force at the local level."); *Gorman Towers v. Bogoslavsky*, 626 F.2d 607, 612 (8th Cir. 1980) (the court could "perceive no material distinction between the need for insulated decision making at the state or regional level and a corresponding need at the municipal level").

dividuals were employed in the Executive Branch, reasoning that "[j]udges have absolute immunity not because of their particular location within the Government but because of the special nature of their responsibilities." \* \* \* This reasoning applies to legislators.

*Id.* at 405 n. 30, quoting *Butz*, 438 U.S. at 511.

It hardly need be added that this reasoning applies equally to local and regional legislators. In fact, if there is a distinction between the two, the case for immunizing *municipal* legislators is the stronger one. "[B]ecause municipal legislators are closer to their constituents they are more vulnerable to litigation and its inhibiting effect." *Aitchison v. Raffiani*, 708 F.2d 96, 98 (3d Cir. 1983). Additionally, "the threat of liability might be an even greater deterrent to service at the local level, where the rewards of pay and prestige generally are less than at the federal or state level." *Shoultes v. Laidlaw*, 886 F.2d 114, 117 (6th Cir. 1989). And elected local officials, unlike appointed regional ones, are "directly accountable to the public for [their] legislative acts." *Lake Country Estates*, 440 U.S. at 407 (Marshall, J., dissenting). This reduces the need for a judicial remedy: "[w]hen municipal officials are elected, rather than appointed as in *Lake Country*, the argument for immunity becomes stronger. The electoral process itself acts as a powerful restraint on improper legislative action." *Aitchison*, 708 F.2d at 98 (citing *Gorman Towers*, 626 F.2d at 612). Finally, the case for

absolute immunity for [local legislators] becomes stronger still when viewed in light of *Owen v. City of Independence*, \* \* \* which reinterpreted section 1983 to make a municipality

liable in damages for all of its unconstitutional conduct. The absence of any immunity for city government not only provides an additional check on unlawful behavior by municipal legislators, but also provides an effective remedy for wronged individuals.

*Id.* at 613 (citation omitted).

3. It may be added that there is nothing novel in this conclusion. In *Owen v. City of Independence*, the four Members of the Court to reach the issue recognized that local legislators were entitled to absolute immunity for actions taken in their legislative capacity. There, the principal issue was the scope of the *municipality's* immunity because Paul Roberts, a city council member, was sued only in his official capacity. But Justice Powell, in a dissent for four Justices, expressly noted that "Roberts himself enjoyed absolute immunity from § 1983 suits for acts taken in his legislative capacity." 445 U.S. at 664 n. 6 (Powell, J., joined by Burger, C.J., Stewart and Rehnquist, JJ., dissenting) (citing *Lake Country Estates*, 440 U.S. at 402-406). In addition, all twelve of the courts of appeals that have addressed this issue have held that local legislative officials acting in their legislative capacity may claim absolute immunity.<sup>8</sup> There is no reason for the Court to disturb this settled law.

<sup>8</sup> See, e.g., *Acevedo-Cordero v. Cordero-Santiago*, 958 F.2d 20 (1st Cir. 1992); *Goldberg v. Rocky Hill*, 973 F.2d 70 (2d Cir. 1992); *Aitchison v. Raffiani*, 708 F.2d 96 (3d Cir. 1983); *Bruce v. Riddle*, 631 F.2d 273 (4th Cir. 1980); *Hernandez v. City of Lafayette*, 643 F.2d 1188 (5th Cir. 1981), cert. denied, 455 U.S. 907 (1982); *Haskell v. Washington Township*, 864 F.2d 1266 (6th Cir. 1988); *Reed v. Village of Shorewood*, 704 F.2d 943 (7th Cir. 1983); *Gorman Towers*

## B. Legislators Act In Their Legislative Capacity When They Propose Or Vote On Municipal Legislation

Concluding that municipal legislators are entitled to absolute immunity for actions taken in their legislative capacity does not end the matter; it remains to determine whether petitioners' particular actions in this case *were* undertaken in a legislative capacity. That inquiry seems a simple enough matter: proposing and voting for municipal legislation—the conduct that is the focus of respondent's claim—would appear to be the quintessential legislative acts. But the First Circuit avoided that conclusion by holding that some legislation actually is not "legislative" at all and, instead, may be characterized as an "administrative act[]" that does not support an assertion of legislative immunity. Pet. App. 64. From that Orwellian starting point, the court of appeals offered its two related tests for distinguishing "between legislative and administrative acts":

The first test focuses on the nature of the facts used to reach the given decision. If the underlying facts on which the decision is based are "legislative facts," such as "generalizations concerning a policy or state of affairs," then the decision is legislative. If the facts used in the decision making are more specific, such as those that relate to particular individuals or situations, then the decision is administrative. The second test focuses on "the particularity of the impact

*v. Bogoslavsky*, 626 F.2d 607 (8th Cir. 1980); *Kuznich v. County of Santa Clara*, 689 F.2d 1345 (9th Cir. 1982); *Fry v. Board of County Comm'rs*, 7 F.3d 936 (10th Cir. 1993); *Espanola Way Corp. v. Meyerson*, 690 F.2d 827 (11th Cir. 1982), cert. denied, 460 U.S. 1039 (1983); *Gross v. Winter*, 876 F.2d 165 (D.C. Cir. 1989).



of the state of action." If the action involves establishment of a general policy, it is legislative; if the action "single[s] out specifiable individuals and affect[s] them differently from others," it is administrative.

*Id.* at 64-65, quoting *Cutting v. Muzzey*, 724 F.2d 259, 261 (1st Cir. 1984).

This approach, which makes the availability of legislative immunity turn on the nature of the underlying legislation supported by the legislator-defendant, is insupportable. It is irreconcilable with this Court's decisions, it finds no support in history, and it would render legislative immunity largely nugatory.

1. In *Tenney*, the Court indicated that legislative immunity is available under Section 1983 when the defendant acted within "the sphere of legitimate legislative activity." 341 U.S. at 376. The scope of that sphere is defined by the purpose of the immunity: to assure "[f]reedom of speech and action in the legislature." *Id.* at 372. As a consequence, the Court held that immunity is available when the challenged action (in *Tenney*, a legislative inquiry) was "an established part of representative government." *Id.* at 377. The Court added that "courts should not go beyond the narrow confines of determining that [the challenged action] may fairly have been deemed within [the legislature's] province. To find that [the challenged legislators' action] has exceeded the bounds of legislative power it must be obvious that there was a usurpation of functions exclusively vested in the Judiciary or the Executive." *Id.* at 378. That principle is dispositive here, for there can be no doubt that voting on legislation—even legislation that is

narrow in scope—is "an established part of representative government."

That conclusion is confirmed by the Court's decisions under the Constitution's Speech and Debate Clause—precedent that is directly applicable here because the Court has noted that the common-law immunity of state (and by extension, local) legislators "is similar in origin and rationale to that accorded Congressmen under the Speech and Debate Clause." The Court accordingly has "equated the legislative immunity to which state legislators are entitled under Section 1983 to that accorded to Congressmen under the [Clause]." *Supreme Court of Virginia*, 446 U.S. at 732, 733 (citations omitted). See *Lake Country Estates*, 440 U.S. at 405 (noting that the rationale for immunity "is reasoning [that] is equally applicable to federal, state, and regional legislators"); *United States v. Johnson*, 383 U.S. 169, 180 (1966) (*Tenney* "viewed the state legislative privilege as being on a parity with the similar federal privilege"). Indeed, citing *Tenney*, the Court has indicated that Speech and Debate immunity is available when challenged conduct "is within the 'sphere of legitimate legislative activity'" (*Gravel v. United States*, 408 U.S. 606, 623 (1972), quoting *Tenney*, 341 U.S. at 376), the formula that governs legislative immunity under Section 1983.

With this as background, the Court has made clear that "[i]n determining whether particular activities \* \* \* fall within the 'legitimate legislative sphere' we look to see whether the activities took place 'in a session of the House by one of its members in relation

to the business before it.' " *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 503 (1975), quoting *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1881).<sup>9</sup> As a consequence, "[i]t is beyond doubt that the Speech or Debate Clause protects against inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts" (*United States v. Brewster*, 408 U.S. 501, 525 (1972)), granting immunity for "acts generally done in the course of the process of enacting legislation" (*id.* at 513) and for those that are "essential to legislating." *Eastland*, 421 U.S. at 508. In particular, "voting by Members \* \* \* may not be made the basis of a civil or criminal judgment against a Member because that conduct is within the 'sphere of legitimate legislative activity.'" *Gravel*, 408 U.S. at 624, quoting *Tenney*, 341 U.S. at 376. See, e.g., *Doe v. McMillan*, 412 U.S. 306, 311-312 (1973); *Kilbourn*, 103 U.S. at 204. See also *Tenney*, 341 U.S. at 374 (speech and debate immunity in Massachusetts constitution recognized to reach "the giving of a vote"). This authority looks to whether the challenged action was part of the legislative process. It plainly does not countenance the First Circuit's inquiry into whether the legislation was premised on "generalizations" rather than "specific facts," or whether it had excessive "particularity."<sup>10</sup>

<sup>9</sup> Accord *Doe v. McMillan*, 412 U.S. 306, 312 (1973); *Gravel*, 408 U.S. at 624; *United States v. Brewster*, 408 U.S. 501, 509 (1972); *Powell v. McCormack*, 395 U.S. 486, 502 (1969).

<sup>10</sup> A majority of the courts to address the issue have agreed that the enactment of ordinances that are budgetary, that eliminate governmental positions, or that restructure local government departments is a legislative activity as a matter of law. See, e.g., *Burtnick v. McLean*, 76 F.3d 611 (4th Cir. 1996) (council member had absolute immunity because the

The court of appeals' distinction also finds no support in the history of common law immunity predating enactment of Section 1983. As we have noted (at 14-15, *supra*), courts in the nineteenth century distin-

passage of a budget ordinance was a legislative act); *Carver v. Foerster*, 102 F.3d 96, 100 (3d Cir. 1996) (elimination of government position is legislative, but a unilateral order to fire an employee is not); *Alexander v. Holden*, 66 F.3d 62 (4th Cir. 1995) (budget decisions that necessarily impact on employment are generally legislative acts); *Gross*, 876 F.2d at 172 n.10 (personnel actions flowing from traditional legislative function like budget decisions are the type of actions for which legislators enjoy absolute immunity); *Finch v. City of Vernon*, 877 F.2d 1497 (11th Cir. 1989) (city council's vote to abolish positions in the police force is a legislative function); *Rateree*, 852 F.2d at 950 (budget making is a quintessential legislative function and job loss as a result of budget process does not make the act administrative); *Aitchison*, 708 F.2d at 98 (mayor entitled to legislative immunity for act of voting to pass ordinance eliminating plaintiff's position, regardless of claim of any unworthy purpose); *Rabkin v. Dean*, 856 F. Supp. 543, 547 (N.D. Cal. 1994) (legislative votes affecting positions and salaries of city employees are consistently interpreted as legislative acts); *Racine v. Cecil County*, 843 F. Supp. 53, 54-55 (D. Md. 1994) (absolute immunity where position eliminated); *Drayton v. Mayor & Council of Rockville*, 699 F. Supp. 1155, 1156 (D. Md. 1988) (job elimination through budgetary process is a legislative act entitled to absolute immunity regardless of alleged discriminatory motives), *aff'd*, 885 F.2d 864 (4th Cir. 1989); *Herbst v. Daukas*, 701 F. Supp. 964, 968 (D. Conn. 1988) (abolition of municipal positions constitutes a legislative act); *Ditch v. Board of County Comm'rs*, 650 F. Supp. 1245, 1248-49 (D. Kan. 1986) (elimination of a program or job title is a formulation of policy and therefore entitled to absolute immunity), *amended on other grounds*, 699 F. Supp. 1553 (D. Kan. 1987); *Dusanenko v. Maloney*, 560 F. Supp. 822, 827 (S.D.N.Y. 1983) (absolute immunity applied to decision by town officials to reduce salaries), *aff'd*, 726 F.2d 82 (2d Cir. 1984); *Goldberg v. Village of Spring Valley*, 538



guished between ministerial and discretionary acts. But *amici* are aware of no decision in any jurisdiction holding that a legislator's discretionary action—an action related to enacted legislation—lost its immunity because it affected an insufficiently large number of people.

2. The court of appeals' attempt to look behind the form of the legislation also is manifestly inconsistent with the purposes of legislative immunity. Legislators are given protection from suit so that fear of liability does not prevent "uninhibited discharge of their legislative duty," while also assuring that they are not distracted in the performance of their official functions. *Tenney*, 341 U.S. at 377; see *Lake Country Estates*, 440 U.S. at 405. Cf. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (qualified immunity combats the "'distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service'") (citation omitted); *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) (same). These important public goals apply with full force to legislation that affects only a narrow subject or limited number of people. Certainly, this Court never has suggested that federal or state legislators lose their immunity when the legislation at issue had a limited scope.<sup>11</sup> And municipal

F. Supp. 646, 650 (S.D.N.Y. 1982) (individual trustees who approved mayor's action which resulted in elimination of plaintiff's position were entitled to absolute immunity).

<sup>11</sup> If that were the rule, the Speech and Debate Clause would lose much of its force. See, e.g., Hitt, *Special Tax Breaks Appear, and May Face Veto*, WALL ST. J., Aug. 1, 1997, at A2 (legislation contains 79 separate tax provisions that benefit 100 or fewer people). As for state legislators, *Tenney* itself involved a challenge to a legislative inquiry that was targeted at a single individual. See 341 U.S. at 370-371.

legislation by definition often will deal with highly localized problems.

In fact, the court of appeals' standard would have the effect of rendering the protections of the immunity doctrine largely nugatory. In adopting its test, the First Circuit sought to address the concern that the "neutral appearance" of an ordinance might be a "ruse" (*Acevedo-Cordero v. Cordero-Santiago*, 958 F.2d 20, 23 (1st Cir. 1992)); the court therefore held that a trial is necessary when "conflicted evidence as to the defendants' true motives raise[s] genuine issues of material fact." Pet. App. 65. But this approach entirely defeats the purpose of immunity, which is "of little value if [legislators] could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader." *Tenney*, 341 U.S. at 377. After all, "the essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action," which includes "an entitlement not to stand trial or face other burdens of litigation." *Mitchell*, 472 U.S. at 525, 526. That is why, "[t]o preserve legislative independence, [the Court] ha[s] concluded that 'legislators engaged 'in the sphere of legitimate legislative activity,' *Tenney v. Brandhove*, 341 U.S. at 376, should be protected not only from the consequences of legislation's results, but also from the burden of defending themselves.'" *Supreme Court of Virginia*, 446 U.S. at 731-732 (citation omitted). See *id.* at 733. Yet by allowing inquiry into whether legislators' actions were prompted by "a constitutionally proscribed reason" (Pet. App. 65), the court of appeals subjected municipal legislators to that burden whenever facts are disputed—and made the resolution of the immunity defense indistinguishable from determination of the *merits* of the plaintiff's claim.

The court of appeals' approach is particularly problematic because the plaintiff's allegation here, as well as application of the court's test, turn largely on the defendant-legislators' motives. Allegations of improper motive like the ones at issue in this case are easy to make, difficult to disprove, and almost always involve disputed issues of fact; as the Court noted in *Tenney*, "dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed." 341 U.S. at 378 (footnote omitted). Indeed, the Court held inquiry into subjective motivation improper in the *qualified* immunity setting precisely because "there often is no clear end to the relevant evidence. Judicial inquiry into subjective motivation therefore may entail broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues. Inquiries of this kind can be peculiarly disruptive of effective government." *Harlow*, 457 U.S. at 816-817 (footnotes omitted). The First Circuit turned that insight on its head by making just such an inquiry a prerequisite for the assertion of *absolute* immunity.

The problems caused by the court of appeals' approach are graphically illustrated here. The court concluded that the City could not be held liable because there was absolutely no evidence that a majority of the city council members who supported the challenged ordinance acted on the basis of an improper motive. Pet. App. 59-63. See *id.* at 59-60 ("Scott-Harris has not only failed to prove that a majority of the councilors possessed a bad motive, but she also has failed to furnish enough circumstantial evidence to ground a finding that, more likely than not, a discriminatory animus propelled the City Council's action."). This means that, even when the constitu-

tionality of a municipal ordinance itself is unassailable, a plaintiff may sue an individual legislator, arguing that he or she supported the ordinance for an improper reason. And such an allegation, as we have explained, almost invariably will involve a disputed issue of fact. This system positively encourages the sort of harassing and vexatious litigation that legislative immunity is designed to prevent.

3. Against this background the appropriate outcome here is plain. Scott-Harris' allegations are directed at legislative acts relating directly to "the introduction and passage of [an] ordinance." Pet. App. 43. If the ordinance was enacted to punish respondent's exercise of her First Amendment rights, she was entitled to have the legislation invalidated and to obtain damages from the City—an approach that she unsuccessfully tried. Cf. *Tenney*, 341 U.S. at 379 (Black, J., concurring) ("the validity of legislative action" is not "coextensive with the personal immunity of the legislature"). But "the individual defendants \* \* \* were acting in a field where legislators traditionally have the power to act" (*ibid.* (majority opinion)) and were engaged in an activity—the enactment of legislation—that lies at the heart of the legislative function. As the Court held in *Tenney*, "the statute of 1871 does not create civil liability for such conduct." *Ibid.*



**CONCLUSION**

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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August 14, 1997

(1)

No. 96-1569

Supreme Court, U. S.

FILED

AUG 14 1997

CLERK

In The

Supreme Court of the United States

October Term, 1996

DANIEL BOGAN and MARILYN RODERICK,

*Petitioners,*

vs.

JANET SCOTT-HARRIS,

*Respondent.*

*On Writ of Certiorari to the United States  
Court of Appeals for the First Circuit*

**BRIEF OF AMICI CURIAE MASSACHUSETTS  
MUNICIPAL ASSOCIATION, CITY OF NEW  
BEDFORD CITY COUNCIL, MASSACHUSETTS CITY  
SOLICITORS AND TOWN COUNSEL ASSOCIATION  
IN SUPPORT OF PETITIONERS**

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51 pp



## TABLE OF CONTENTS

	<i>Page</i>
Interest of the <i>Amici Curiae</i> .....	1
Summary of Argument .....	1
Argument .....	2
I. The Decision by the Lower Court is Having a Direct and Adverse Impact on Pending Cases Involving the Question of Absolute Legislative Immunity. ....	2
II. Application of the Lower Court's Holding Renders Ineffective the Protections Offered to Legislators and is Contrary to Public Policy. ....	9
Conclusion .....	13

## TABLE OF CITATIONS

### Cases Cited:

<i>Acevedo-Cordero v. Cordero-Santiago</i> , 958 F.2d 20 (1st Cir. 1992) .....	7
<i>Berkley v. The Common Council of the City of Charleston</i> , 63 F.3d 295 (4th Cir. 1995), <i>cert. denied</i> , 116 S. Ct. 775 (1996) .....	11, 12
<i>Buckley v. Fitzsimmons</i> , 509 U.S. 259 (1993) .....	7
<i>Coffin v. Coffin</i> , 4 Mass. 1 (1808) .....	11

## Contents

	<i>Page</i>
<i>Colon, et al. v. City of New Bedford, et al.</i> , No. 95-12212-REK (D. Mass. filed October 10, 1995) .....	2, 4, 5, 6, 8
<i>Cutting v. Muzzey</i> , 724 F.2d 259 (1st Cir. 1984) .....	7
<i>Forrester v. White</i> , 484 U.S. 219 (1988) .....	7, 10
<i>Gorman Towers v. Bogoslavsky</i> , 626 F.2d 607 (8th Cir. 1980) .....	12
<i>Kuzinich v. County of Santa Clara</i> , 689 F.2d 1345 (9th Cir. 1982) .....	12
<i>Lagon v. Maryland</i> , 448 F. Supp. 935 (D. Md. 1977) ..	12
<i>Monell v. New York City Dep't of Social Services</i> , 436 U.S. 658 (1978) .....	12
<i>Reed v. Shorewood</i> , 704 F.2d 943 (7th Cir. 1983) .....	12
<i>Spallone v. United States</i> , 493 U.S. 265 (1990) .....	9, 11
<i>Supreme Court of Va. v. Consumers Union</i> , 446 U.S. 719 (1980) .....	8, 9
<i>Tenney v. Brandhove</i> , 341 U.S. 367 (1951) .....	8
<b>Statutes Cited:</b>	
Mass. Gen. L. ch. 43, § 56 .....	3
Mass. Gen. L. ch. 43, § 57 .....	3

## Contents

	<i>Page</i>
Mass. Gen. L. ch. 43, § 58 .....	3
Mass. Gen. L. ch. 43, § 59 .....	3
New Bedford City Ordinance Ann., Code § 2-20 .....	3
New Bedford City Ordinance Ann., Code § 2-21 .....	3
New Bedford City Ordinance Ann., Code § 2-40 .....	3
New Bedford City Ordinance Ann., Code § 2-59 .....	4
New Bedford City Ordinance Ann., Code § 2-76 .....	4
New Bedford City Ordinance Ann., Code § 19-91 ....	3
New Bedford City Ordinance Ann., Code § 19-96 ....	4
New Bedford City Ordinance Ann., Code § 19-116 ...	3

## APPENDIX

Appendix A — Amended Complaint in the matter of <i>Colon, et al. v. City of New Bedford, et al.</i> , No. 95-12212-REK (D. Mass. Filed October 10, 1995) ....	1a
Appendix B — Selected Code Sections of the New Bedford City Ordinances Annotated .....	18a
Appendix C — Massachusetts General Laws Chapter 43, Selected Sections .....	21a



## Contents

	Page
Appendix D — Memorandum and Order dated July 28, 1997 in the matter of <i>Colon, et al. v. City of New Bedford, et al.</i> , No. 95- 12212-REK (D. Mass. Filed October 10, 1995) .....	23a

INTEREST OF THE *AMICI CURIAE*

*Amici*, organizations whose members include the cities and towns of the Commonwealth of Massachusetts, the sitting New Bedford City Council, municipal officials throughout Massachusetts, and past and present city solicitors and town counsel, have a compelling interest in legal issues that affect state and local governments. *Amici*, and their members, have an especially strong interest in legal issues affecting municipal legislators and the integrity of the legislative process.<sup>1</sup>

## SUMMARY OF ARGUMENT

The lower court's holding is inconsistent with the rights conferred by the doctrine of absolute immunity.<sup>2</sup> By delving into the motives of individual legislators, the application of the standards articulated by the lower court results in an unwarranted and unnecessary intrusion by the judiciary into the legislative process, and the abrogation of the absolute immunity doctrine.

The questions raised by the Petitioners and the Court have been analyzed at length in the Petitioners' Brief on the merits submitted to the Court. The *amici curiae* agree with the Petitioners' brief on the merits, and have submitted this brief for the sole purpose of bringing to the Court's attention the ramifications and recent developments resulting from the decision rendered by the lower court.

---

1. The parties have consented to the filing of this brief *amici curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *amici curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

2. The lower court's holding is sometimes referenced herein as "*Scott-Harris*".

## ARGUMENT

### I.

#### THE DECISION BY THE LOWER COURT IS HAVING A DIRECT AND ADVERSE IMPACT ON PENDING CASES INVOLVING THE QUESTION OF ABSOLUTE LEGISLATIVE IMMUNITY.

The decision of the Court of Appeals for the First Circuit has resulted in the abrogation of the intended protections of the absolute immunity doctrine in legislative areas other than position-elimination ordinances. Moreover, the *ad hoc* approach articulated by the court, whereby an activity is characterized as legislative or administrative depending on the motives of a legislator, has left legislators and the United States District Courts in the First Circuit without an objective standard by which to determine what actions constitute protected legislative activities.

The court of appeal's decision and its application of a "motivation standard" have a direct and immediate impact on pending cases involving the question of legislative immunity. By way of example, the *amici* wish to bring to the Court's attention the case of *Colon, et al. v. City of New Bedford, et al.*, No. 95-12212-REK (D. Mass. filed October 10, 1995). Plaintiffs in the *Colon* case filed a complaint in the United States District Court for the District of Massachusetts against the City of New Bedford, and the chief and various police officers of the New Bedford Police Department, seeking damages arising out of an alleged unjustified beating and arrest by certain New Bedford City police officers on October 15, 1992. The plaintiffs subsequently amended their complaint on December 13, 1996, and added five former and six current members of the New Bedford City Council in their individual capacity. The plaintiffs also added a former Mayor of New Bedford in his individual

capacity. The amended complaint is reproduced in Appendix A at App. 1a-17a. The plaintiffs look beyond the alleged wrongdoers and the typical defendants in this type of civil rights action, such as the police, municipality and the executive branch, and attempt to hold legislators liable in their individual capacity. See count six of the amended complaint "Supervisory Liability". App. at 15a.

In their amended complaint, the plaintiffs allege that the New Bedford City Councilors, through their acts and omissions, displayed a reckless or callous and deliberate indifference to the constitutional rights of the people who would come in contact with the New Bedford Police employees. See App. at 15a, ¶ 48. Specifically, the plaintiffs allege that as City Councilors and members of the City Council Public Safety Subcommittee, the City Councilors were policy-making officials of the New Bedford Police Department, and were responsible for investigating and studying all matters relative to the safety of the lives of the people of the City of New Bedford, for promulgating rules and regulations for the governance and management of the New Bedford Police Department, and for supervising and training New Bedford Police employees.<sup>3</sup> App. at 5a and 15a, ¶¶ 15 and 48. Plaintiffs further allege that the City Councilors employed a grossly deficient system of investigating misconduct by on-duty police officers, failed to assure that allegations of beatings and wrongful arrests were properly investigated, and failed to take reasonable steps to prevent such incidents. App. at 15a, ¶ 48.

---

3. The individual city councilors and city council body have no authority to supervise and train the police department. All supervisory authority rests exclusively with the executive branch of government, the Mayor and police chief. See New Bedford City Ordinance Ann., Code §§ 19-91, 19-116, 2-20, 2-21 and 2-40. App. at 18a-20a. Also see Mass. Gen. Laws ch. 43, §§ 56, 57, 58 and 59 (establishing Plan "B" government by Mayor and Council). App. at 21a-22a. The Plaintiffs allege that the failure to supervise and train arose out of failure to engage in certain legislative functions and from an implied duty arising out of the activities described in Footnote 7.



The underlying theory in both the *Scott-Harris* case and the *Colon* case is substantially similar. In the *Scott-Harris* case, the plaintiff claimed that the defendant mayor and councilor violated her right to free speech by the passage of a position-elimination ordinance. The plaintiffs in the *Colon* case claim that the failure of the individual city council members to undertake certain legislative functions in a particular manner caused the alleged injuries inflicted by the police officers. The conduct at issue in *Scott-Harris* involves a legislative activity (*i.e.*, the passage of a position-elimination ordinance); similarly, the conduct in *Colon* involves legislative activities (*i.e.*, the authority of the City Council to investigate matters of public safety,<sup>4</sup> to promulgate rules and regulations for adoption by the Mayor regarding the operation of the police department,<sup>5</sup> and to hold a police disciplinary hearing at the discretion of the Mayor<sup>6</sup>). Both cases allege a violation of the plaintiffs' civil rights. In both cases, the plaintiffs seek to hold legislators personally liable for their legislative activities.<sup>7</sup> The councilor

4. See New Bedford City Ordinance Ann., Code §§ 2-59 and 2-76. App. at 19a.

5. See New Bedford City Ordinance Ann., Code § 19-96. App. at 20a.

6. See New Bedford City Ordinance Ann., Code § 19-116. App. at 20a.

7. Separate and apart from Plaintiffs' claim in *Colon* that the city councilors failed to take certain legislative actions, the Plaintiffs also claim in their Memorandum in Opposition to the Defendants' Motion for Summary Judgment that the city councilors engaged in administrative activities which created an implied duty to supervise the police department. In support of this claim, Plaintiffs cited some sixty-two (62) matters over an eight (8) year period. These matters, by and large, addressed constituents' requests and complaints which were communicated to the New Bedford Police Department sometimes by an individual city councilor and sometimes by the city council

(Cont'd)

and mayor in *Scott-Harris* were found personally liable based upon their "improper motives", and further, that they acted "maliciously" or with "reckless indifference". Joint Appendix at 149-153. Similarly, the foundation of the plaintiffs' claim in *Colon* is that the city councilors' failure to investigate and legislate constitute "deliberate indifference". In both *Scott-*

(Cont'd)

body. The Plaintiffs examined these matters in detail and argue that they represent administrative acts which indicate that the New Bedford City councilors supervised the Police on a case by case basis. The Plaintiffs found five (5) of these matters particularly noteworthy, apparently due solely to the fact that the communications used the word "direct" rather than "request". Specifically, these "directives" included the city council "directing" the New Bedford Police Department to crack down on public drinking in the park (1987), to take care of serious problems of cherry bombs and unruly motorcycle gangs (1987), to note that a certain house may be operating as a store selling questionable items (1991), to enforce a cease and desist order against a local auto body shop (1992), and to monitor and evaluate the noise and large crowds on a particular street (1992).

Although an official acting outside the scope of his or her authority can be held liable for such action, the proposition that a legislator who fails to take an action, *i.e.*, to supervise the Police, should be held liable when such legislator has no legal duty or authority to engage in such activity is without precedent. Moreover, finding liability under such circumstances would be contrary to public policy. A city councilor engages in many functions and activities in the service of his or her constituents and the public good in general. One of the most important roles of a city councilor is to serve as a "first line of contact" between the public and other branches of the city government. When the street is not plowed, when there is public drinking in the park, when the garbage is not collected, when there is drag racing in the street, when a neighborhood association requests more police patrols, when a stop sign is needed, and when a hundred other such matters need attention, it is the city councilor who is first contacted. A city councilor should be able to receive the requests and complaints of the public and bring such concerns to the attention of the appropriate department of the city government for consideration and action without fear of having created an implied duty to take further actions as suggested by the theory proffered by the Plaintiffs in the *Colon* case.

*Harris* and *Colon*, the plaintiffs seek to attribute "improper motives" to the legislative activities, thereby converting legislative activities into administrative functions.

The eleven city councilors in the *Colon* case moved for summary judgment on the grounds that, *inter alia*, they could not be held liable personally under the doctrine of absolute immunity. The Hon. Robert E. Keeton, presiding over the case in the United States District Court for the District of Massachusetts, dismissed without prejudice the city councilors' motion for summary judgment. The Memorandum and Order is reproduced in Appendix D at App. 23a-33a. Since guidance from the Court was forthcoming in connection with the *Scott-Harris* case, the district court concluded that it would be imprudent to grant the motion for summary judgment on the grounds of legislative immunity and stayed further proceedings relative to the city councilors pending such guidance. App. at 27a-29a, 31a.

The district court in the *Colon* case also based its dismissal without prejudice of the motion for summary judgment on the failure of the city councilors to show that no genuine issue of material fact existed as to whether the city councilors' actions were legislative or administrative. App. at 29a, 30a, 31a. The district court recognized that different formulas have been applied to determine whether a legislator is protected by the shield of absolute immunity. The *Colon* court applied the "functional approach", citing *Scott-Harris* as follows:

Although legislative immunity is absolute within certain limits, legislators are not immune with respect to all actions that they take. The dividing line is drawn along a functional axis that distinguishes between legislative and administrative acts. The former are protected, the latter are not. See *Acevedo-Cordero*, 958 F.2d at 23. We have

used a pair of tests for separating the two: *The first test focuses on the nature of the facts used to reach the given decision. If the underlying facts on which the decision is based are "legislative facts," such as "generalizations concerning a policy or state of affairs," then the decision is legislative. If the facts used in the decision making are more specific, such as those that relate to particular individuals or situations, then the decision is administrative. The second test focuses on "the particularity of the impact of the state of action."* If the action involves establishment of a general policy, it is legislative; if the action "single[s] out specifiable individuals and affect[s] them differently from others," it is administrative. Citing *Cutting v. Muzzey*, 724 F.2d 259, 261 (1st Cir. 1984) (citation omitted).

See App. at 29a-30a (citing *Scott-Harris*, 1997 WL 9102 at \*13) (emphasis in original).

Although the *Colon* court references the "functional test", the *Colon* court cites *Scott-Harris*, *Acevedo-Cordero*, and *Cutting*, which examine the legislators' motives rather than applying an objective functional standard in determining whether an activity is legislative in nature, and thus immune from liability. The Court applies a "functional approach", which examines "the nature of the function performed, not the identity of the actor who performed it." *Forrester v. White* 484 U.S. 219, 222 (1988); see also *Buckley v. Fitzsimmons*, 509 U.S. 259, 269 (1993).

The *Scott-Harris* approach frustrates the principal objectives



of the absolute immunity doctrine as evidenced by the *Colon* court's examination of the differences between legislative and administrative acts for determining whether immunity applies.

*When the relevant facts are uncontroverted and sufficiently developed, the question whether an act is "administrative" as opposed to "legislative" is a question of law, and it may be decided by the judge on a pretrial motion. See Acevedo-Cordero, 958 F.2d at 23. When the material facts are genuinely disputed, however, the question is properly treated as a question of fact, and its disposition must await the trial.*

*See App. at 30a (citing Scott-Harris, 1997 WL 9102 at \*12-\*13) (emphasis in original). Given the nature of sophisticated pleadings, any legislator's motives could be questioned, thereby raising a question of fact and making a pre-trial determination unlikely. Absolute immunity is intended to be raised at the early stages of the litigation so as not only to protect legislators "from the consequences of litigation's results, but also from the burden of defending themselves." Supreme Court of Virginia v. Consumers Union, 446 U.S. 719, 731-732 (1980). This very premise was clearly articulated by the Court in Tenney v. Brandhove, when it held that absolute immunity:*

*would be of little value if . . . . [legislators] could be subjected to the cost and inconvenience and distraction of a trial upon a conclusion of the pleader, or the hazard of a judgment against them based upon a jury's speculation as to motive.*

*Tenney, 341 U.S. 367, 377 (1951).*

## II.

### APPLICATION OF THE LOWER COURT'S HOLDING RENDERS INEFFECTIVE THE PROTECTIONS OFFERED TO LEGISLATORS AND IS CONTRARY TO PUBLIC POLICY.

As a matter of public policy, legislators, as individuals, must be protected from private civil actions arising out of traditional legislative activities. Absent such a policy there would be a chilling effect on the ability of legislative bodies to discharge their responsibilities and there would be a significant disincentive for private citizens to seek elective office. The public policy argument has been explored at length by the Court and articulated as follows:

*[L]egislators must be free to represent their constituents "without fear of outside interference" that would result from private lawsuits. . . . Private lawsuits threaten to chill robust representation by encouraging legislators to avoid controversial issues or stances in order to protect themselves "not only from the consequences of litigation's results but also from the burden of defending themselves."*

*Spallone v. United States, 493 U.S. 265, 300 (1990) (citing Supreme Court of Virginia v. Consumers Union, 446 U.S. 719, 731-32 (1980)).*

Clearly, the courts have the difficult task of balancing two competing interests. On the one hand, there should be a method to remedy wrongful conduct and sanction a wrongdoer; on the other hand, legislators must be able to discharge their legislative

duties without fear of lawsuit so as to promote the efficient operation of government. The Court has discussed the balance of these interests and concluded that:

[s]uits for monetary damages are meant to compensate the victims of wrongful actions and to discourage conduct that may result in liability. Special problems arise, however, when government officials are exposed to liability for damages. To the extent that the threat of liability encourages these officials to carry out their duties in a lawful and appropriate manner, and to pay their victims when they do not, it accomplishes exactly what it should. By its nature, however, the threat of liability can create perverse incentives that operate to inhibit officials in the proper performance of their duties. In many contexts, government officials are expected to make decisions that are impartial or imaginative, and that above all are informed by considerations other than the personal interest of the decision maker. Because government officials are engaged by definition in governing, their decisions will often have adverse effects on other persons. When officials are threatened with personal liability for acts taken pursuant to their official duties, they may well be induced to activities implicating the substance of their decisions in the cases before them.

*Forrester v. White*, 484 U.S. 219, 221 (1988) (citation omitted). The legislator's primary responsibility is to represent his or her constituency. To discharge this responsibility effectively,

legislators must be afforded meaningful immunity from private suit attempting to hold them personally liable for their legislative activities. Long ago, the Massachusetts Supreme Judicial Court expressed the following view of the legislative privilege, which was recently endorsed by the Court:

[t]hese privileges are thus secured, not with the intention of protecting the members against prosecution for their own benefit, but to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of persecutions, civil or criminal. I therefore think that the article ought not to be construed strictly, but liberally, that the full design of it may be answered. I will not confine this to delivering an opinion, uttering a speech, or haranguing in debate; but will extend it to the giving of a vote, to the making of a written report, and to every other act resulting from the nature, and any execution, of the office

...

*Coffin v. Coffin*, 4 Mass. 1, 27 (1808) (cited with approval in *Spallone v. United States*, 493 U.S. 265, 279 (1990)). What value would such esteemed reverence for the protection of the legislative process have if its protectorate "absolute immunity" was so easily disarmed by an allegation of improper motive as enunciated by the holding of the court of appeals?

The appropriate application of the absolute immunity doctrine does not prevent plaintiffs from seeking relief. Liability against the municipality is not precluded simply because the local legislators are immunized in their individual capacities. *Berkley v. The Common Council of the City of Charleston*, 63



F.3d 295 (4th Cir. 1995), (holding that a "municipality's liability for [the official acts of municipal policy makers] extends to acts for which the policy-making officials might enjoy absolute immunity because the acts were legislative or judicial in character") *cert. denied*, 116 S. Ct. 775 (1996), (citing *Reed v. Shorewood*, 704 F.2d 943, 953 (7th Cir. 1983)) *See also Kuzinich v. County of Santa Clara*, 689 F.2d 1345, 1350 (9th Cir. 1982) (complete immunity of county legislators does not immunize the county). Plaintiffs, in seeking to redress civil rights violations, have the remedy of maintaining an action against the municipality itself for monetary, declaratory and injunctive relief. *Monell v. New York City Dep't of Social Services*, 436 U.S. 658, 663 (1978). The extraordinary intrusion into the legislative branch of government resulting from delving into the motives of the individual legislator is not necessary for plaintiff's remedy.

Local legislators are closer to controversies than their federal counterparts and should be afforded the full measure of protection offered by the absolute immunity doctrine. *Gorman Towers v. Bogoslavsky*, 626 F.2d 607, 612 (8th Cir. 1980), ("Because municipal legislators are closer to their constituents than either their state or federal counterparts, they are, perhaps, the most vulnerable to and the least able to defend lawsuits caused by the passage of legislation.") (quoting *Lagon v. Maryland*, 448 F. Supp. 935, 947 (D. Md. 1977)). Local legislators and lower courts need to apply a uniform standard in evaluating whether the activities of a local legislator fall within the protections of the absolute immunity doctrine. The standard articulated by the Court of Appeals for the First Circuit is inconsistent with the holdings of the Court.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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**APPENDIX A — AMENDED COMPLAINT IN THE  
MATTER OF *COLON, et al. v. CITY OF NEW  
BEDFORD, et al.*, No. 95-12212-REK (D. MASS.  
FILED OCTOBER 10, 1995)**

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

Civil Action 95-12212-REK

EDWIN TORRES COLON; JUANA COLON HERNANDEZ

Plaintiff

v.

CITY OF NEW BEDFORD, MASSACHUSETTS; STEPHEN  
GREANY, GARDNER GREANY, PAUL ROZARIO, WAYNE  
RIJO, CARL MORIN, CHRISTOPHER DEXTRADEUR,  
individually and as Police Officers of the City of New Bedford,  
Massachusetts; CHIEF RICHARD BENOIT, individually and  
as Police Chief of the City of New Bedford, Massachusetts;  
JOHN K. BULLARD, individually; FREDERICK M. KALISZ,  
JR., DAVID ALVES, BRIAN K. GOMES, THOMAS M.  
HODGSON, GEORGE ROGERS, JOHN T. SAUNDERS,  
DAVID J. GERWATOWSKI, CYNTHIA G. KRUGER, MARY  
S. BARROS, KENNETH M. FERREIRA, and MARK ZAJAC,  
individually

Defendants



*Appendix A***FIRST AMENDED COMPLAINT****Introduction**

1. This is a civil rights action against police officers of the City of New Bedford, Massachusetts, the chief of police, Mayor, city council and the City arising from the beating of Edwin Torres Colon and Juana Colon Hernandez at the residence of Juana Colon Fernandez located at 385 Cottage Street, New Bedford on October 15, 1992. The complaint alleges that Mr. Torres and Ms. Colon were assaulted and Mr. Torres was wrongfully arrested by police officers on that evening. The complaint further alleges that the defendants chief of police, city council, and the City of New Bedford failed to properly train its police officers, tolerated and permitted a pattern of illegal beatings and arrests by on duty police officers, failed to properly investigate such incidents and discipline the officers involved, and failed to maintain a proper system for reviewing complaints of police misconduct by the public with the result that police officers of the City of New Bedford were encouraged to believe that they could violate the rights of people such as Mr. Torres and Ms. Colon with impunity.

**Jurisdiction and venue**

2. This action is brought pursuant to 42 U.S.C. § 1983 and the Fourth, Fifth, Eighth and Fourteenth Amendments to the United States Constitution. Jurisdiction is founded on 28 U.S.C. §§ 1331 and 1343.
3. The plaintiffs further invoke the supplemental jurisdiction of the Court, pursuant to 28 U.S.C. § 1367 and the pendant

*Appendix A*

jurisdiction of this Court to hear and decide claims arising under state law.

4. All individual parties are residents of Massachusetts. The municipal defendant is located in Massachusetts.

**Parties**

5. Plaintiff Edwin Torres Colon is a citizen of the United States and a resident of the Commonwealth of Massachusetts.
6. Plaintiff Juana Colon Hernandez is a citizen of the United States and a resident of the Commonwealth of Massachusetts.
7. Defendant Stephen Greany was at all times mentioned herein a duly appointed officer of the police department of the City of New Bedford, Massachusetts. He is named individually.
8. Defendant Gardner Greany was at all times mentioned herein a duly appointed officer of the police department of the City of New Bedford, Massachusetts. He is named individually.
9. Defendant Paul Rozario was at all times mentioned herein a duly appointed officer of the police department of the City of New Bedford, Massachusetts. He is named individually.
10. Defendant Wayne Rijo was at all times mentioned herein a duly appointed officer of the police department of the

*Appendix A*

City of New Bedford, Massachusetts. He is named individually.

11. Defendant Carl Morin was at all times mentioned herein a duly appointed officer of the police department of the City of New Bedford, Massachusetts. He is named individually.
12. Defendant Christopher Dextradeur was at all times mentioned herein a duly appointed officer of the police department of the City of New Bedford, Massachusetts. He is named individually.
13. Defendant Richard Benolt is and was at all times described in this complaint Police Chief of the City of New Bedford. As such he was the commanding officer of defendants Stephen Greany, Gardner Greany, Paul Rozario, Wayne Rijo, Carl Morin and Christopher Dextradeur and was responsible for the training, supervision, and conduct of officers of the New Bedford Department, he is also responsible for enforcing the regulations of the New Bedford Police Department and for ensuring that New Bedford police officers obey the regulations of the New Bedford Police Department and the laws of the Commonwealth of Massachusetts and the United States. As chief of the New Bedford Police Department, he was a policy making official of the City of New Bedford. He is named individually and in his official capacity.
14. Defendant John K. Bullard was at all times described in this Complaint Mayor of the City of New Bedford. As such he was responsible for the overall training, supervision and conduct of the New Bedford Police

*Appendix A*

Department. He was also responsible by law for ensuring that New Bedford police officers obeyed the regulations of the New Bedford Police Department and the laws of the Commonwealth of Massachusetts and the United States. He was the highest policy making official of the City of New Bedford. He is named individually.

15. The defendants Frederick Kalisz, Jr., David Alves, Brian Gomes, Thomas M. Hodgson, George Rogers, John T. Saunders, David J. Gerwatowski, Cynthia G. Kruger, Mary S. Barros, Kenneth M. Ferreira and Mark Zajac were at all times described in this complaint city councillors of the City of New Bedford and members of the public safety committee. As city councillors and members of the public safety committee, they were policy making officials of the New Bedford Police Department. The city councillors, as policy makers and members of the public safety committee, were responsible for investigating and studying all matters relative to the safety of the life of the people of the City of New Bedford and for promulgating and regulations for the governance and management of the New Bedford Police Department. They were responsible for supervising and training New Bedford police employees. They are named in their individual capacities.
16. The defendant City of New Bedford is a municipality incorporated under the laws of the Commonwealth of Massachusetts and at all relevant times employed the defendants Stephen Greany, Gardner Greany, Paul Rozario, Wayne Rijo, Carl Morin and Christopher Dextradeur as police officers, the defendant, Richard Benoit as Police Chief, the defendant John K. Bullard as



*Appendix A*

Mayor and the defendants Frederick Kalisz, David Alves, Brian Gomes, Thomas Hodgson, George Rogers, John Saunders, David Gerwatowski, Cynthia Kruger, Mary Barros, Kenneth Ferreira and Mark Zajac as city councillors.

17. The defendants Stephen Greany, Gardner Greany, Paul Rozario, Wayne Rijo, Carl Morin, Christopher Dextradeur, and Richard Benoit were acting under color of state law and pursuant to their authority as police officers and Police Chief of the City of New Bedford in all actions alleged in this Complaint.

**Factual Allegations**

18. On October 15, 1992, Edwin Torres Colon was approached by New Bedford Police Officer Stephen Greany outside his mother's home at 385 Cottage Street, New Bedford as he was working on his car.
19. Officer Greany, without offering any explanation, informed Mr. Torres that he was under arrest.
20. Officer Greany then asked Mr. Torres his name. When Mr. Torres responded Officer Greany accused him of using a false name at which time Mr. Torres resumed to the house to get his identification.
21. Upon entering the house Mr. Torres stated that he was being confused with someone else and was going to get his identification.
22. Immediately thereafter, Officers Rozario, Greany, Morin,

*Appendix A*

Dextradeur and Detective Greany illegally broke in the door, hitting Ms. Colon in the head.

23. The officers entered the apartment with their weapons drawn. One of the officers punched Mr. Torres in the eye, causing him to fall to the floor. Officers Greany and Morin then dragged Mr. Torres into the bedroom and pushed him onto the bed.
24. Mr. Torres was struck repeatedly in the back with a club and punched in the head. The officers cuffed Mr. Torres. While Mr. Torres was cuffed, Officer Greany struck him on the arm and right leg with his club. —
25. Throughout the attack on her son, Ms. Colon pleaded with the officers not to hit Mr. Torres. When she attempted to stop them from hitting her son, one of the officers struck her on the hand with his club and pushed her onto the bed.
26. Officers Morin and Greany wrongfully placed Mr. Torres under arrest for two counts of assault and battery on a police officer, assault by means of a deadly weapon and for being a disorderly person in order to cover up their own wrongdoing.

*Appendix A*

**COUNT ONE  
PHYSICAL ABUSE  
(42 U.S.C. § 1983 claim)**

The plaintiff repeats and realleges all the foregoing paragraphs.

27. The physical abuse of Mr. Torres and Ms. Colon by the defendants was unjustified and unwarranted.
28. The defendants Stephen Greany, Gardner Greany, Morin, Dextrateur, Rozario and Rijo deprived Mr. Torres and Ms. Colon of the following clearly established and well-settled rights, as protected by the Fourth, Fifth, Eighth and Fourteenth Amendments to the United States Constitution.
  - a. Freedom from the use of excessive and unreasonable force;
  - b. Freedom from the deprivation of liberty without due process of law; and
  - c. Freedom from summary punishment.
29. The defendants subjected Mr. Torres and Ms. Colon to these deprivations of their rights maliciously and with a reckless disregard for whether Mr. Torres and Ms. Colon's rights would be violated by their actions.

*Appendix A*

**COUNT TWO  
WRONGFUL ARREST  
(42 U.S.C. § 1983 claim)**

The plaintiff repeats and realleges all the foregoing paragraphs.

30. The defendants had no probable cause or reasonable grounds to arrest Mr. Torres at the time he was taken into custody.
31. The defendants wrongfully charged Mr. Torres with Assault and Battery on a Police Officer, Assault by Dangerous Weapon and with being a Disorderly Person in order to justify their verbal and physical abuse of Mr. Torres and to cover up their own wrongdoing.
32. As a result Mr. Torres was deprived of his liberty without due process of law in violation of his rights as protected by the Fifth and Fourteenth Amendments to the United States Constitution.

**COUNT THREE  
POLICY AND PRACTICE CLAIMS  
(42 U.S.C. § 1983 claim)**

The plaintiff repeats and realleges all the foregoing paragraphs.

33. The Rules and Regulations of the New Bedford Police Department ("Department Regulations"), section 501.13, state that police officers shall be responsible for the proper safeguard of any person in their custody under arrest or



## Appendix A

detention. This regulation states that any abusive words or actions against persons in custody shall subject the officer to disciplinary action.

34. Additionally Section 512 of the Departmental Regulations states that the unnecessary use of physical force by an officer constitutes gross misconduct.
35. Nonetheless, In violation of Section 501.13 of the Departmental Regulations prior to October 15, 1992, the City of New Bedford through its policy makers permitted and tolerated a pattern and practice of unjustified, unreasonable and illegal beatings and verbal abuse of persons arrested by police officers of the City of New Bedford. Although such conduct was improper, the officers involved were not prosecuted, disciplined or subjected to retraining and such incidents were in fact covered up with official claims that the conduct was justified and proper. As a result, New Bedford police officers were caused and encouraged to believe that persons could be subjected to verbal and physical abuse under circumstances not requiring the use of such abuse, and that such unjustified, unreasonable and illegal conduct would be accepted by the City of New Bedford.
36. Examples of the City of New Bedford's pattern and practice of unjustified, unreasonable and illegal beatings, deprivation of medical attention, verbal abuse of and illegal acts against persons arrested by police officers prior to October 15, 1992 include the following civil actions in the United States District Court for the District of Massachusetts:

## Appendix A

- a. *Magnetti v. Polletier, Chief of Police of the City of New Bedford*, CA 71-229-C (Unlawful entry by police into apartment.)
- b. *Weeks v. Gffford, et al.*, CA 77-3143-S (Defendant New Bedford Police Officers violated plaintiffs civil rights.)
- c. *Assaf v. City of New Bedford, et al.*, CA 84-2130-WD (Defendant Police officers violated plaintiffs civil rights.)
- d. *McKenna, et al. v. Officer Thomas Conloy, Jr.*, CA 88-523-S (Officer assaulted and beat the plaintiffs and violated their civil rights).
- e. *Fisher v. City of New Bedford, et al.*, CA 88-0067-N and *Bretton v. New Bedford, et al.*, CA 88-0101-N (Officers beat plaintiffs in cruiser and at police station in the presence of commanding officers, then refused medical care. City conducted sham investigation designed to hide its culpability. City maintained practice and policy of covering tip allegations of brutality.)
- f. *Milosek v. City of New Bedford, et al.*, CA 88-2366-MA (Officers beat plaintiff in police cruiser. Supervisory officers at police station failed to inquire as to cause of plaintiffs injuries, and refused to conduct a proper investigation of officers' brutal misconduct. City maintained practice and policy of covering up allegations of brutality.)
- g. *Costa v. City of New Bedford, et al.*, CA 91-11337-H (Wrongful arrest. City had policy or practice of failing to properly train officers in arrest procedures.)

## Appendix A

- h. *Gonsalves v. City of New Bedford, et al.*, CA 91-11993-WF (Decedent died in custody after being beaten by police and denied medical attention. City had policy or practice of failing to properly train officers in arrest procedures, and in determining when detainees are in need of medical attention.)
  - i. *Flalho, et al. v. Officer Thomas Flood*, CA 91-13054 (Illegal arrest where the officer assaulted and beat the plaintiffs and violated their civil rights.)
  - j. *Luz Monica Rodriguez, et. al. v. Elaine Silvs, et. al.*, CA 94-10430-MEL (Officers subjected plaintiffs to unconstitutional strip search and body cavity examination in a police cruiser on a public street in New Bedford.)
37. Additional lawsuits alleging police brutality and a failure to properly train New Bedford police officers have been filed in the state courts.
  38. The City of New Bedford maintained a deficient system of reviewing claims of unjustified, unreasonable and illegal beatings and verbal abuse of arrested persons. This deficient system failed to identify the misconduct by officers and failed to subject officers who engaged in such misconduct to discipline, closer supervision or retraining, to the extent that it has become the *de facto* policy and custom of the City of New Bedford to tolerate such improper conduct by police officers.
  39. Specific systemic flaws in the City of New Bedford's misconduct review process include, but are not limited to, the following:

## Appendix A

- a. Reports of investigations of misconduct incidents were prepared as routine point-by-point justifications police officer's actions, regardless of whether such actions were justified;
  - b. Police officers investigating misconduct incidents systematically failed to credit testimony by non-police officer witnesses, and uncritically relied on reports by police officers involved in the incident;
  - c. Police officers investigating misconduct incidents failed to include in their reports relevant factual information that contradicted the statements of the police officers involved;
  - d. Supervisory police officers issued public statements exonerating police officers for misconduct before the investigation of the incident by the police department had been completed;
  - e. Reports in misconduct cases were not reviewed for accuracy by supervisory officers. Conclusions were permitted to be drawn on the basis of clearly incorrect or contradictory information.
40. Additionally, the New Bedford Police Department tolerated a practice of officers failing to report incidents of abuse by other officers toward persons in custody, in violation of Section 501.10 of the Departmental Regulations, which regulation requires officers observing or becoming aware of violations of regulations to report such violation to a commanding officer. As a result the New Bedford Police Department had a custom or policy



*Appendix A*

of officers failing to report abusive conduct by other officers.

41. The foregoing acts, omissions, systemic flaws, policies and customs of the City of New Bedford led police officers to believe that unjustified, unreasonable and illegal beatings and verbal abuse of arrested persons would not be aggressively, honestly and properly investigated, with the foreseeable result that officers were more likely to use force and verbal abuse in situations where such force and verbal abuse was neither necessary nor reasonable.
42. The City of New Bedford was required by Article XXVI of an Agreement between the City of New Bedford and the New Bedford Police Union to "provide a regular in-service training program for all officers designed to improve the quality of Police protection in the city."
43. As a direct and proximate result of the aforesaid acts, omissions, systemic flaws, policies and customs of the defendant City of New Bedford, the defendant police officers beat and verbally abused Mr. Torres and Ms. Colon, which was a direct and proximate cause of their injuries.

**COUNT FOUR  
ASSAULT AND BATTERY  
(Massachusetts tort claim)**

The plaintiff repeats and realleges all the foregoing paragraphs.

44. The defendant police officers assaulted and battered Mr. Torres and Ms. Colon.

*Appendix A*

**COUNT FIVE  
MASSACHUSETTS RIGHTS ACT VIOLATIONS  
(G.L. c. 12 §11I claim)**

The plaintiff repeats and realleges all the foregoing paragraphs.

45. The defendants violated Mr. Torres and Ms. Colon's rights under the Fourth, Fifth, Eighth and Fourteenth Amendments to the United States Constitution and under Articles One, Fourteen and Twenty-six of the Declaration of Rights of the Inhabitants of the Commonwealth of Massachusetts.
46. The above actions of the defendant were taken by means of threat, intimidation and coercion.
47. As a result, the defendants violated Mr. Torres and Ms. Colon's rights as protected by G.L. c. 12 §11I.

**COUNT SIX  
SUPERVISORY LIABILITY**

The plaintiff repeats and realleges all the foregoing paragraphs.

48. The actions and omissions of defendants Benoit as Chief, Bullard as Mayor and Frederick Kalisz, Jr., David Alves, Brian Gomes, Thomas Hodgson, George Rogers, John Saunders, David Gerwatowski, Cynthia Kruger, Mary Barros, Kenneth M. Ferreira and Mark Zajac as city councillors in investigating allegations of misconduct by civilians against on duty New Bedford police employees

*Appendix A*

and in supervising and training New Bedford police employees displayed a reckless or callous indifference to the constitutional rights of others when it would be obvious to any reasonable official that his conduct was very likely to result in the violation of the constitutional rights of a person coming in contact with New Bedford police employees. The defendants acted with deliberate indifference to the constitutional rights of all those who would come in contact with the New Bedford police employees. The defendants employed a grossly deficient system of investigating allegations of misconduct by on duty police officers directed at people in the community and failed to assure that allegations of beatings and wrongful arrest were properly investigated and to take reasonable steps to prevent such incidents in New Bedford

**DAMAGES**

49. The above conduct by the defendants was a direct and proximate cause of Mr. Torres and Ms. Colon's injuries.
50. As a result of the false charges, Mr. Torres was forced to hire an attorney and endure the stress and humiliation of two criminal trials while defending himself from fabricated allegations.

WHEREFORE, the plaintiffs request that this court:

- a. Award compensatory damages against the defendants jointly and severally.
- b. Award punitive damages against the individual defendants.

*Appendix A*

- c. Award the plaintiffs their costs of this action, including attorney's fees in accordance with 42 U.S.C. § 1988 and M.G.L. c. 12 § 111.
- d. Award the plaintiffs prejudgment interest, and
- e. Award such other and further relief as this Court deems appropriate.

**Jury trial demand**

The plaintiff demands a trial by jury.

Edwin Torres Colon  
Juana Colon  
By their attorneys,  
s/ Robert A. Griffith  
ROBERT A. GRIFFITH  
BBO No. 211900  
CRANE M. POMERANTZ  
BBO No. 629701  
Schwartz, Shaw & Griffith  
30 Federal Street  
Boston, MA 02110  
(617) 338-7277

DATED: December 12, 1996



**APPENDIX B — SELECTED CODE SECTIONS OF THE  
NEW BEDFORD CITY ORDINANCES ANNOTATED**

**CITED SECTIONS OF THE NEW BEDFORD CITY  
CODE ORDINANCE**

**Sec. 2-20. Executive head of city.**

The mayor shall be the executive head of the city and charged with administrative responsibility.

(Code 1963, § 1-101)

**Annotations** — *Dooling v. City Council of Fitchburg*, 242 Mass. 599 (1922); 136 NE 616; *Bell v. Treasurer of Cambridge*, 310 Mass. 484 (1941)

**State law reference** — Similar provision, M.G.L.A. c. 43, § 58.

**Sec. 2-21. Head of police and fire departments.**

The mayor shall be the executive head and general directing authority in control and management of the police and fire departments, subject to limitations enumerated in this Code.

(Code 1963, § 1-113)

**Sec. 2-40. Legislative power.**

The legislative power of the city shall be vested in the city council.

(Code 1963, § 2-101)

*Appendix B*

**Annotations** — As to enactment of vetoed ordinances, see *James v. New Bedford*, 319 Mass. 74 (1946); as to enactment of salary ordinances, see the above case, and *Morra v. New Bedford*, 340 Mass. 240 (1960), 163 N.E. 2d 268; *Souza v. New Bedford*, 320 Mass. 541, 70 N.E. 2d 802.

**Cross reference** — Enactment, etc., of ordinances, §§ 1-4 — 1-7.

**State law references** — Similar provisions, M.G.L.A. c. 43, § 59; open meetings law, c. 39, § 23H.

**Sec. 2-59. Duties in general.**

The committees herein named shall perform such duties as are specifically provided by ordinance, and all such other duties as may properly come within the scope of the committee designation, subject however, to the direction of the city council. The city council may refer any matter to such of said committees as the nature of the subject would render appropriate for investigation and report.

(Code 1963, § 2-111)

**Sec. 2-76. Duties of the committee on public safety.**

The duties of the committee on public safety shall investigate and study all matters relative to the safety to the life of the people in the city and property located therein.

(Ord. of 4-10-86, § 1(11))

*Appendix B***Sec. 19-91. Duties of chief generally.**

The chief of police, subject to the orders of the mayor, shall be at the head of the police department, and shall have entire control of the department, and of special officers as hereinafter provided. The chief shall faithfully discharge the duties of the office and shall see that the laws of the state and ordinances of the city are duly observed and enforced, and shall promptly execute all orders of the mayor and council. (Code 1963, § 7-102)

**Sec. 19-96. Rules and regulations by mayor and city council.**

The mayor and council may make such further rules and regulations for the government and management of the police department as they may deem expedient. (Code 1963, § 7-110)

**Sec. 19-116. Discipline.**

The chief of police shall promptly report to the mayor all violations of duty on the part of any member of the police department, and the mayor may cause charges to be preferred thereon. The hearing on such charges shall be before the mayor and city council who may remove, suspend or fine for cause deemed by them sufficient, after due hearing, and subject to the provisions of civil service as set forth in Massachusetts General Laws, Chapter 31, section 41. (Code 1963, § 7-106)

**APPENDIX C — MASSACHUSETTS GENERAL LAWS  
CHAPTER 43, SELECTED SECTIONS**

**CITED SECTIONS OF THE MASSACHUSETTS  
GENERAL LAWS**

**PLAN B. — GOVERNMENT BY MAYOR AND COUNCIL  
ELECTED BY DISTRICTS AND AT LARGE.**

**43:56. Plan B.**

Section 56. The method of city government provided for in the eight following sections shall be known as Plan B.

**43:57. Operative date of plan.**

Section 57. Upon the adoption by a city of Plan B, it shall become operative as provided in sections one to forty-five, inclusive.

**43:58. Mayor as chief executive officer; election; tenure.**

Section 58. There shall be a mayor, elected by and from the qualified voters of the city, who shall be the chief executive officer of the city. He shall hold office for the term of two years from the first Monday in January following his election and until his successor is qualified.

**43:59. City council; number; election; tenure.**

Section 59. The legislative powers of the city shall be vested in a city council. One of its members shall be elected by the council annually as its president. In cities having more than seven wards, the city council shall be composed of fifteen members, of whom one shall be elected from each ward by and from the



## Appendix C

qualified voters of that ward, and the remaining members shall be elected by and from the qualified voters of the city. In cities having seven wards or less, the city council shall be composed of eleven numbers, of whom one shall be elected from each ward by and from the qualified voters of that ward, and the remaining members shall be elected by and from the qualified voters of the city.

At the first regular municipal election held in a city after its adoption of Plan B, except as otherwise provided in this section, the councillors elected from each ward shall be elected to serve for one year, and those elected at large shall be elected to serve for two years, from the first Monday in January following their election and until their successors are qualified; and at each regular municipal election thereafter the councillors elected to fill vacancies caused by the expiration of the terms of councillors shall be elected to serve for two years.

If the plan adopted provides for elections to be held biennially, at the first regular municipal election held under the provisions of such plan and at each biennial election thereafter, all the councillors whether elected at large or by wards shall be elected to serve for two years from the first day of January following their election and until their successors are qualified.

**APPENDIX D — MEMORANDUM AND ORDER DATED  
JULY 28, 1997 IN THE MATTER OF COLON, et al. v.  
CITY OF NEW BEDFORD, et al., No. 95-12212-REK  
(D. MASS. FILED OCTOBER 10, 1995)**

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

CIVIL ACTION  
NO. 95-12212-REK

EDWIN TORRES COLON and JUANA COLON  
HERNANDEZ,

Plaintiffs -

v.

CITY OF NEW BEDFORD, STEPHEN GREANY, GARDNER  
GREANY, PAUL ROZARIO, WAYNE RIJO, CARL MORIN,  
CHRISTOPHER DEXTRADEUR, individually and as Police  
Officers of the City of New Bedford, CHIEF RICHARD  
BENOIT, individually and as Police Chief of the City of New  
Bedford, JOHN K. BULLARD, individually, FREDERICK M.  
KALISZ, JR., DAVID ALVES, BRIAN K. GOMES, THOMAS  
M. HODGSON, GEORGE ROGERS, JOHN T. SAUNDERS,  
DAVID J. GERWATOWSKI, CYNTHIA G. KRUGER, MARY  
S. BARROS, KENNETH M. FERREIRA, and MARK ZAJAC,  
individually,

Defendants

*Appendix D*Memorandum and Order  
July 29, 1997

Pending before the court at the hearing of July 28, 1997 were the following motions:

(1) Council Defendants' Motion to Extend Time to File Answer (Docket No. 52, filed January 8, 1997).

(2) Council Defendants' Motion for Summary Judgment as to Count VI of the Amended Complaint (Docket No. 53, filed January 17, 1997).

(3) Plaintiffs' Motion to Compel (Docket No. 75, filed April 9, 1997).

(4) Plaintiffs' Second Motion to Compel (Docket No. 78, filed May 15, 1997).

(5) Plaintiffs' Motion for Attorney Fees (Docket No. 83, filed June 11, 1997).

The court heard argument on these motions on July 28, 1997 and announced its decisions orally. This memorandum confirms those rulings, and stated reasons for them, to aid the parties and the court in future proceedings in this case.

**I. Background**

This civil action arises from an incident that the plaintiffs allege occurred on October 15, 1992. The plaintiffs allege that, on that date, the plaintiff Edwin Torres Colon was assaulted and wrongly arrested by police officers of the City of New Bedford.

*Appendix D*

(Plaintiffs' First Amended Complaint ¶¶18-26.) The plaintiffs also allege that the police officers injured Ms. Juana Colon Hernandez, the mother of Edwin Torres Colon in the course of making this arrest. (Id.)

Several claims have been made against several defendants in this civil action. The plaintiffs have sued the City of New Bedford, several police officers of the City of New Bedford, the Police Chief, the Mayor, and the City Council.

The plaintiffs have made claims for physical abuse and wrongful arrest under 42 U.S.C. §1983. They also claim that the City of New Bedford, through its policy makers, permitted and tolerated a pattern of improper conduct by the New Bedford police force, and as such, the City of New Bedford is liable under 42 U.S.C. §1983. The plaintiffs further allege that the Chief of Police, the Mayor, and the city council members are liable under a theory of supervisory liability because:

[T]he acts and omission of the defendants . . . [Chief of Police, the Mayor, and the city council members] in investigating allegations of misconduct by civilians against on duty New Bedford police employees and in supervising and training New Bedford employees displayed a reckless or callous indifference to the constitutional rights of others when it would be obvious to any reasonable official that his conduct was very likely to result in the violation of the constitutional rights of a person coming in contact with New Bedford police employees. The defendants acted with deliberate



*Appendix D*

indifference to the constitutional rights of all those who would come in contact with the New Bedford police employees. The defendants employed a grossly deficient system of investigating allegations of misconduct by on duty police officers directed at people in the community and failed to assure that allegations of beatings and wrongful arrest were properly investigated and to take reasonable steps to prevent such incidents in New Bedford.

(¶48.)

The plaintiffs seek compensatory and punitive damages, as well as costs, attorney's fees, and prejudgment interest.

## II. Motion to Extend Time

The individual city counsel member defendants (the "council defendants") request that this court enlarge the time to file an answer to the plaintiffs' amended complaint. The council defendants request that they be given until ten days after this court rules on the council defendant's Motion for Summary Judgment. In support of this motion, the defendants note that the attorney who filed the summary judgment motion is not the attorney the council defendants have chosen to act as counsel for other purposes in this civil action.

This motion is allowed.

*Appendix D*

## III. Motion for Summary Judgment

The council defendants move for summary judgment on all counts against them on the grounds that, if the plaintiffs' allegations are true, they are entitled to absolute legislative immunity. These defendants argue that if they engaged in activities related to the police misconduct alleged by the plaintiffs, their activities were legislative in nature, thus entitling them to legislative immunity. The defendants further contend that this question is one of law, and is appropriately decided on a motion for summary judgment.

The plaintiffs counter that the council defendants' activities were administrative in nature, and thus the types of activities for which a legislator is not entitled to absolute legislative immunity.

After examining the briefs, and after oral argument on this motion, the court determines that there are two separate grounds for denying the motion for summary judgment at this time.

First, a question remains as to whether local legislators are entitled to absolute immunity from liability under §1983 for actions taken in a legislative capacity, like that given to state lawmakers.

The Court of Appeals for the First Circuit has recently reconsidered the question of whether local legislators, such as city council members, are entitled to the same absolute immunity afforded to state lawmakers and regional officials, stating:

The [Supreme] Court has yet to decide whether local legislators are protected by this

## Appendix D

strain of absolute immunity, *see Lake Country Estates*, 440 U.S. at 404 n. 26, 99 S.Ct. at 1178 n. 6 (reserving the question), but the lower federal courts, including this court, have shown no reticence in holding that the doctrine of legislative immunity is available to such persons. We reaffirm today that the shield of legislative immunity lies within reach of city officials.

*Scott-Harris v. City of Fall River*, \_\_ F.3d \_\_, 1997 WL 9102, (1st Cir. Jan. 15, 1997) (citations omitted).

The Supreme Court has granted certiorari in the *Scott-Harris* case, putting particular emphasis on the question of whether local legislators are entitled to absolute legislative immunity. In granting the petition for certiorari, the Court stated:

The petition for a writ of certiorari is granted. In addition to the questions presented by the petition, the parties are directed to brief and argue the following question: Are individual members of a local legislative body entitled to absolute immunity from liability under 42 U.S.C. §1983 for actions taken in a legislative capacity?

1997 WL 181002 (U.S.).

An assertion by city council members of absolute immunity for their legislative acts is a threshold question. Although neither party briefed this issue, it would be imprudent for the court to dismiss the council defendants on grounds of legislative

## Appendix D

immunity when guidance from the Supreme Court is expected soon.

The possibility that legislative immunity does not apply to local legislative bodies is but one reason this court should be hesitant to allow the council defendants' motion for summary judgment at this time. An alternative reason is that the defendants have not shown that no genuine dispute of material fact exists as to whether the council defendants were acting in a legislative or instead an administrative capacity in connection with the incident that forms the basis for this civil action.

It is true that courts have prescribed several different formulas for a district court to use when considering whether a legislator is protected by the shield of absolute immunity. The Court of Appeals for the First Circuit has discussed the relevant distinctions, noting that:

Although legislative immunity is absolute within certain limits, legislators are not immune with respect to all actions that they take. The dividing line is drawn along a functional axis that distinguishes between legislative and administrative acts. The former are protected, the latter are not. *See Acevedo-Cordero*, 958 F.2d at 23. We have used a pair of tests for separating the two: The first test focuses on the nature of the facts used to reach the given decision. If the underlying facts on which the decision is based are "legislative facts," such as "generalizations concerning a policy or state of affairs," then the decision is legislative. If



## Appendix D

the facts used in the decision making are more specific, such as those that relate to particular individuals or situations, then the decision is administrative. The second test focuses on "the particularity of the impact of the state of action." If the action involves establishment of a general policy, it is legislative; if the action single[s] out specifiable individuals and affect[s] them differently from others." It is administrative. *Cutting v. Muzzey*, 724 F.2d 259, 261 (1st Cir. 1984) (citations omitted).

*Scott-Harris*, 1997 WL, 9102 at \*12-\*13.

The issues as to whether the actions taken by the city council here were legislative or administrative in nature may be a question of fact, but may also be a question of law. In discussing the difference between legislative acts and administrative acts for the purpose of determining whether immunity applies, the Court of Appeals for the First Circuit has stated the following test:

*When the relevant facts are uncontroverted and sufficiently developed, the question whether an act is "administrative" as opposed to "legislative" is a question of law, and it may be decided by the judge on a pretrial motion. See Acevedo-Cordero, 958 F. 2d at 23. When the material facts are genuinely disputed, however, the question is properly treated as a question of fact, and its disposition must await the trial.*

*Id.* at \*13 (emphasis added).

## Appendix D

The present submissions lead this court to the belief that genuine disputes regarding material facts will affect the ultimate determination of legislative immunity. For example, a dispute exists as to whether the City Council influences the daily operations of the New Bedford police department on a case-by-case basis. These areas of dispute remain genuine disputes of material fact to be determined at trial. *Acevedo-Cordero v. Cordero-Santiago*, 958 F. 2d 20, 23 (1st Cir. 1992). This court also recognizes that it may be too early in this case for the relevant facts to be sufficiently developed. Especially is this true for the council defendants, who were only recently, in December of 1996, added to the complaint.

For these reasons, the council defendants' motion for summary judgment is dismissed without prejudice. The council defendants must answer the complaint within ten days of July 28, 1997, the date of the court's decision on the record to deny the motion for summary judgment. The court will, however, stay proceedings on the claims against the council defendants pending the Supreme Court's decision in the *Scott-Harris* case.

## IV. Discovery Motions

As stated and explained in the hearing on July 28, 1997, the court allows the plaintiffs' first and second motions to compel. The defendants are required to turn over all documents requested in those motions to compel, or else describe any document not produced and explain the asserted good cause for not producing. If good cause for not producing is asserted as to a document, the defendant(s) will bring the document to the hearing set for October 23, 1997 at 3:00 p.m.

Decision on the Plaintiffs' Motion for Attorneys Fees is deferred until this hearing.

*Appendix D*

Also, the plaintiffs' and defendants' cross motions for extension of discovery deadlines (included in Docket No. 75 and 77) are allowed to the following extent. Discovery will be extended, for good cause, as to the issues pertinent to Count VI of the amended complaint, and as to pattern and practice issues that were the subject of the motions to compel decided July 28, 1997.

**V. Trial Date**

As stated in the hearing on July 28, 1997, the court has allowed a motion to extend the trial date in this case. The trial date set for Sept. 29, 1997 is cancelled. A new trial date is set for April 13, 1998 at 9:00 a.m. Final pre-trial conference is set for April 2, 1998 at 3:30 p.m.

**VI. ORDER**

For the foregoing reasons, it is ordered:

(1) Council Defendants' Motion to Extend Time to File Answer (Docket No. 52, filed January 8, 1997) is ALLOWED.

(2) Council Defendants' Motion for Summary Judgment as to Count VI of the Amended Complaint (Docket No. 33, filed January 17, 1997) is DISMISSED WITHOUT PREJUDICE. Proceedings in this civil action are stayed *only as to* claims asserted in Count VI, once answers have been filed on behalf of council defendants.

(3) Plaintiffs' First Motion to Compel (Docket No. 75, filed April 9, 1997) is ALLOWED.

*Appendix D*

(4) Plaintiffs' Second Motion to Compel (Docket No. 78, filed May 15, 1997) is ALLOWED.

(5) The parties' cross motions to extend discovery are ALLOWED (included in Dockets No. 75 and 77) to the extent that discovery is extended as to the issues pertinent to Count VI of the amended complaint and as to the pattern and practice issues that were the subject of the motions to compel decided on July 28, 1997.

s/ Robert E. Keeton  
United States District Judge



MOTION FILED

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No. 96-1569

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In The  
**Supreme Court of the United States**  
*October Term, 1996*

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DANIEL BOGAN and MARILYN RODERICK,  
*Petitioners,*

vs.  
JANET SCOTT-HARRIS,  
*Respondent.*

---

On Writ Of Certiorari  
To The United States Court Of Appeals  
For The First Circuit

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**MOTION OF AMICI CURIAE TO FILE  
AMICUS BRIEF OUT OF TIME  
&  
BRIEF OF AMICI CURIAE  
WESTBORO BAPTIST CHURCH  
IN SUPPORT OF RESPONDENT**

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Westboro Baptist Church*

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**MOTION OF AMICI CURIAE**  
**WESTBORO BAPTIST CHURCH**  
**FOR LEAVE TO FILE AMICUS BRIEF**  
**OUT OF TIME**

Westboro Baptist Church<sup>1</sup> moves the Court for an order permitting her to file an amicus brief in support of respondent's position in this matter, out of time.

Per Supreme Court Rule 37.3(b), movant advises the Court respondent's counsel has consented to the filing of this amicus brief, and petitioners' counsel have both withheld consent.

Per Supreme Court Rule 37.3(b), movant herewith states the nature of her interest: Movant is an Old School Baptist Church in Topeka, Kansas. Movant's members have engaged in a street picketing ministry for about seven years, addressing the Bible position on the issue of homosexuality. The movant's religious street picketing has occasioned much controversy, which has resulted in political pressure on local officials to take punitive action against the picketing. By virtue of these experiences, movant has had the opportunity to observe circumstances which may be relevant to the Court's consideration on the question of whether local legislators should be afforded absolute immunity or qualified immunity for their legislative acts.

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<sup>1</sup> Per Supreme Court Rule 37.6, the Court is hereby advised counsel for movant authored the brief in whole. No person or entity made any monetary contribution to the preparation or submission of this brief other than Westboro Baptist Church and her members.



In addition to movant's rather unique perspective on these issues, movant also has a strong interest in the outcome of this issue, and therefore desires to present a few arguments to the Court for consideration. Citizens who hold and publicly convey a particularly unpopular view are those with the greatest need for fidelity to the Constitution from officials. These citizens have a strong interest in how this Court will respond to instances of demonstrated betrayal of this duty. Movant's members are in such a posture, and thus have a keen interest in how the Court resolves this interest.

Movant's interest and perspective are sufficiently unique, vis-a-vis the parties before the Court, such that movant respectfully believes she can offer some helpful argument on the issue. Movant has no financial interest in this case, nor is she impacted by the outcome of the specific binary dispute in the case before the Court. Further, movant's perspective is quite different from the government's, as represented in the amicus briefs filed herein. This different outlook could provide the Court with insight on the public policy considerations related to legislative immunity. Movant desires the opportunity to present argument which focuses on her needs, and the needs of Americans who find themselves in a similar posture.

The motion to file *out of time* is made because counsel was unaware of the pendency of this case until last week. Events have transpired recently concerning a proposal by the Topeka City Council to pass an ordinance restricting the size of picket signs. These events prompted counsel to update her research on individual liability of local legislators who sponsor or vote for a law which they know to be unconstitutional. Movant does not ask the Court in any fashion to address or comment on the merits of this ongoing

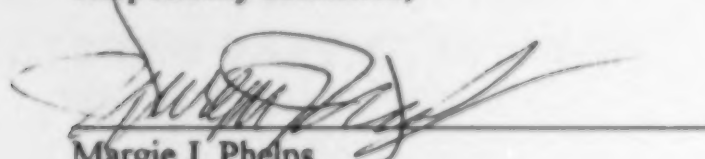
matter, but only informs the Court of the circumstances in general terms to explain why movant did not earlier seek to intervene by the filing of an amicus brief in this matter. Upon researching the issue, counsel learned of the pendency of this action. The importance of this issue to movant, because of immediate concerns, and the long term impact of the Court's decision on legislative immunity, prompted this request.

Per Supreme Court Rule 37.3(b), this motion is attached to the amicus brief which movant seeks to file with the Court in this matter.

For the reasons indicated above, movant respectfully asks the Court to permit filing of the attached brief of amicus.

Further, that the Court considers movant's brief in connection with its review of the question of whether local legislators should be afforded absolute immunity in a Section 1983 action for their legislative acts

Respectfully submitted,



Margie J. Phelps

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No. 96-1569

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On Writ Of Certiorari  
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**BRIEF OF AMICI CURIAE**  
**WESTBORO BAPTIST CHURCH**  
IN SUPPORT OF RESPONDENT

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## **TABLE OF CONTENTS**

INTEREST OF THE AMICI CURIAE .....	<u>1</u>
SUMMARY OF ARGUMENT .....	<u>2</u>
ARGUMENT .....	<u>4</u>
A. Public Policy Suggests Absolute Immunity Should Not Be Afforded Local Legislators For Legislative Acts Done In Bad Faith .....	<u>4</u>
B. Qualified Immunity Fits The Purposes Of Section 1983 Better .....	<u>7</u>
C. Absolute Immunity To Local Legislators Creates An Imbalance And Inequity .....	<u>11</u>
CONCLUSION .....	<u>12</u>

## TABLE OF AUTHORITIES

<i>Berkley v. Common Council of City of Charleston</i> , 63 F.3d 295 (4th Cir. 1995) .....	12
<i>Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah</i> , 508 U.S. 520, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993) .....	7
<i>Grossman v. City of Portland</i> , 33 F.3d 1200 (9th Cir. 1994) .....	11
<i>Harlow v. Fitzgerald</i> , 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982) .....	6
<i>Nichols v. Village of Pelham Manor</i> , --- F.Supp. --- 1997 WL 436489 (S.D.N.Y., 7/31/97) .....	11
<i>Spallone v. United States</i> , 493 U.S. 265, 110 S.Ct. 625, 107 L.Ed.2d 644 (1990) .....	5
<i>Tenney v. Brandhove</i> , 341 U.S. 367, 71 S.Ct. 783 (1951) .....	7

## INTEREST OF THE AMICI CURIAE

Amici curiae Westboro Baptist Church is an Old School Baptist church in Topeka, Kansas. Her members have engaged in religious street picketing, in opposition to the homosexual movement and agenda, on Bible grounds, for about seven years. This religious street picketing has generated a substantial amount of attention and controversy. The local media has gone through cycles of intense coverage, predominantly unbalanced and unflattering. This coverage, for instance, has included editorials which call on local officials to take action which is punitive toward Westboro's members, all with the goal of halting or regulating the picketing. In addition, various groups have formed, long and short term, organizing for the stated purpose of curtailing the daily religious street picketing engaged in by Westboro's members. These groups lobby with local officials, whose campaigns they finance or support in varying degrees, and through a multitude of activities try to influence official action, including legislative, concerning Westboro's picketing.

These circumstances have cased a series of acts by various officials at various levels, responsive to the call by the media and special interest groups to react in some manner to the religious street picketing. Westboro would respectfully suggest that what her members have experienced is a phenomenon on the rise in America. Elected officials and politicians have historically reacted to political and media pressure, and Americans have come to expect nothing less. However, as this country grapples with difficult issues, like abortion, preferential treatment for homosexuals, and the like, the need for politicians to rise above the commotion of



emotion will become crucial. By virtue of her member's controversial street picketing ministry, Westboro has come face to face with the tension between a duty and political livelihood, repeatedly. The manner in which the Court decides and writes on legislative immunity will have direct impact on the ability of Westboro's members -- and those similarly situated -- to resist official reaction to a cry for unconstitutional action.

For these reasons, Westboro is in a position to offer an outlook on this issue which is different from the perspective offered by the parties or others who have provided briefs herein. Further, Westboro has a unique interest in how this issue is decided, because the outcome will have an immediate and direct impact on the ability of her members to protect their constitutional rights.

### SUMMARY OF ARGUMENT

There are strong public policy arguments for affording qualified immunity only to local legislators for their legislative acts. The purpose of legislative immunity is to protect the interests of the people, which are reposed in a local legislator. If a local official responds to political pressure and knowingly violates established constitutional rights through legislative acts, the people are not served. Local legislators today have the sophistication and resources available to remain sufficiently informed about what is or is not constitutional, such that they have no need for the considerable protection of absolute immunity. A local legislator acting with a pure heart will receive adequate protection through qualified immunity.

The purpose of Section 1983 is better served through qualified immunity. Section 1983 calls on local legislators to protect constitutional rights, even if doing so is personally distasteful or politically unpopular. If a local legislator knows the law he votes for is wrong, but does so because it is politically popular to cast this vote, the legislator is obstructing the purpose of Section 1983. In that case, the local legislator should be held accountable in a Section 1983 action.

Police officers are afforded qualified immunity only, and can be held liable for enforcing an unconstitutional law, if it is shown the constitutional right violated was well established and the officer acted unreasonably. Municipalities can be held liable in damages for the unconstitutional acts of legislators, which means the people are held liable. An unfair imbalance is created, then, if the people who passed the laws, or engaged in the unconstitutional acts, are shielded completely from liability.

### ARGUMENT

The briefs filed in this action recognize a two-part analysis used by the Court in determining whether to afford immunity to certain officials. First, the Court inquires whether the immunity sought was established in the law at the time the Civil Right Act was enacted in 1871. Second, the Court inquires whether the purpose of Section 1983 counsels against recognizing the immunity, even if it was available at common law. The second inquiry will be addressed in this brief.

**A. Public Policy Suggests Absolute Immunity Should Not Be Afforded Local Legislators For Legislative Acts Done In Bad Faith**

It has been said legislative immunity (as well as other official immunities, e.g., judicial and prosecutorial) are actually immunities given to and for the people.

In perhaps the earliest American case to consider the import of the legislative privilege, the Supreme Judicial Court of Massachusetts, interpreting a provision of the Massachusetts Constitution granting the rights of freedom of speech and debate to state legislators, recognized that "the privilege secured by it is not so much the privilege of the house as an organized body, as of each individual member composing it, who is entitled to this privilege, even against the declared will of the house. For he does not hold this privilege at the pleasure of the house; but derives it from the will of the people...." *Coffin v. Coffin*, 4 Mass. 1, 27 (1808). This theme underlies our cases interpreting the Speech or Debate Clause and the federal common law of legislative immunity, where we have emphasized that any restriction on a legislator's freedom undermines the "public good" by interfering with the rights of the people to representation in the democratic process. .... *Spallone v. United States*, 493 U.S. 265, 279, 110 S.Ct. 625, 634, 107 L.Ed.2d 644 (1990).

A rule of absolute -- instead of qualified -- immunity does not carry out this purpose. It is very appropriate to provide a local legislator with protection from suit when he acts in the interest of the people. It is equally inappropriate

to provide a local legislator with protection when he manifestly did not act in the best interest of the people, which should never be defined in a manner that includes patently unconstitutional acts.

This distinction is terribly important in this generation of special interest groups. This country is seemingly awash in special-interest-driven decision making, to the dismay of the average citizen. It is contrary to the interests of the public to afford politicians elected to local legislative positions absolute immunity in this environment. Public policy strongly suggests the best enforcement of the purpose behind this immunity is found by limiting the protection to those instances where the legislator acted reasonably and in accord with well-established constitutional principles.

The Court can judicially note the fact local legislators generally have access to legal advice through attorneys paid for by the people. The Court can further judicially note the trend toward more sophisticated and informed local officials, with access to administrative and legal assistance and advice in the performance of official duties. Further, local officials have access to state attorneys general, through whom they can obtain legal opinions if they are in doubt about the quality of advice they are receiving locally. Information about this Court's decisions are more available to the public, including legislators, than was ever available before. The advent of technology, increased training and professional development opportunities, and the media's greater understanding of and attention to this Court's opinions, are all means through which local officials can be informed about the proper manner of carrying out their oaths to uphold the Constitution.



Any person unwilling to take his oath to uphold and abide by the constitution should not seek public office. It is argued that exposure to litigation will deter people from seeking public office. With respect, this may be more a straw man than fact. The Court can judicially note the many advantages attending holding public office. Even if the pay is limited (which it often is not), there are a variety of personal, political and financial advantages attending public office. Local offices are frequently used as the spring board for higher office. Local office holders gain exposure which generates business contacts with financial advantages. Whether the person seeking office does so out of a purely eleemosynary desire to serve mankind, or out of a baser desire for financial rewards, benefits flow from holding public office.

If a local legislator is acting in accord with the Constitution, he no longer needs fear protracted litigation. The protection available since *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982) is adequate for the official who is sensitive to the oath he took to uphold the Constitution. If a legislator knowingly violates this oath, why should he be afforded full immunity? How is that ensuring that the office serves the people?

**B. Qualified Immunity Fits The Purposes Of Section 1983 Better**

The purpose behind legislative immunity was described by this Court in *Tenney v. Brandhove*, 341 U.S. 367, 383, 71 S.Ct. 783, 786 (1951):

.... 'In order to enable and encourage a representative of the public to discharge his public trust with

firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of everyone, however powerful, to whom the exercise of that liberty may occasion offense.'

Section 1983 calls on public officials to act consistent with the Constitution, and to *not* violate the Constitution. Section 1983 expects this out of officials whether or not doing so is popular with the majority of the citizens served by the official. If the threat of intimidation by powerful forces leads the local legislator to use his legislative power to undertake unconstitutional acts, Section 1983 is violated. In this instance, affording absolute immunity does not carry out the purpose of Section 1983.

To illustrate the point made, we quote from this Court's opinion in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 541, 113 S.Ct. 2217, 1131, 124 L.Ed.2d 472 (1993), describing what the city legislators did in that case:

.... The minutes and taped excerpts of the June 9 session, both of which are in the record, evidence significant hostility exhibited by residents, members of the city council, and other city officials toward the Santeria religion and its practice of animal sacrifice. The public crowd that attended the June 9 meetings interrupted statements by council members critical of Santeria with cheers and the brief comments of Pichardo with taunts. When Councilman Martinez, a supporter of the ordinances, stated that in prerevolution Cuba "people were put in jail for practicing this religion," the audience applauded. ....

Other statements by members of the city council were in a similar vein. For example, Councilman Martinez, after noting his belief that Santeria was outlawed in Cuba, questioned: "[I]f we could not practice this [religion] in our homeland [Cuba], why bring it to this country?" Councilman Cardoso said that Santeria devotees at the Church "are in violation of everything this country stands for." Councilman Mejides indicated that he was "totally against the sacrificing of animals" and distinguished kosher slaughter because it had a "real purpose." The "Bible says we are allowed to sacrifice an animal for consumption," he continued, "but for any other purposes, I don't believe that the Bible allows that." The president of the city council, Councilman Echevarria, asked: "What can we do to prevent the Church from opening?" (Emphasis added.)

This is a sad testimony to truth, and reflects conduct by elected officials, pandering to popular disagreement with a religious belief and practice, which should not be protected by absolute immunity. The Santeria devotees were left with challenging the ordinances in expensive and protracted litigation in federal court. The entire burden was shouldered by this small group of people whose religion was unpopular. The elected city council members, who used a government platform to impose personal and popular beliefs about what the Bible says, had no risk and no exposure. Neither the purpose of legislative immunity nor the purpose of Section 1983 were served.

Imagine if it was even worse. Imagine if the City Attorney had told the City Council outright, in a public meeting, that the ordinance was unconstitutional. Imagine if

at least one previous effort to pass such an ordinance had been defeated by an executive veto, accompanied by a public statement that the proposed ordinance, and the thinking behind it, was unconstitutional. Imagine if one or more attorneys acting on behalf of the Santeria devotees had appeared before the council and explained in plain terms the unconstitutionality of the proposed legislation. Then you can begin to see why absolute immunity is unfair.

The facts as reflected in this Court's opinion in *Hialeah* raise another point. There the officials charged with protecting constitutional rights were leading the charge trampling those rights. This is not an unheard of situation. We live in a time in our nation's history when it is politically popular to stand in front of a bank of reporters and stir up the passions of the people. Especially on controversial and sensational issues that receive a lot of media attention. Consider the unfairness of allowing an official who stirs up sentiment and foments unrest to use that unrest to justify sponsoring or voting for legislation which is known to be unconstitutional. Imagine, for instance, a candidate running for office on a promise to take official action to stop abortion picketers from picketing in the town where he is running for office. Then, upon taking office, for political gain, the same official sponsors and votes for legislation placing unconstitutional limits on picketing. This official is clearly not acting for the good of the people. Even if he receives accolades from the pro-choice picketers. Even if the local media praises him for standing up to the abortion picketers. Even if the only people speaking up agree with and praise him. This is political pandering, and it should not be allowed to hide behind the skirts of legislative immunity.



If a public official completely ignores well-established constitutional rights, and evidence is produced that he knew he was violating the Constitution, the purpose of Section 1983 is *frustrated* by affording absolute immunity. If a public official opts for personal spite or political popularity and reelection, instead of protecting the known constitutional rights of a controversial, unpopular or dissenting person or group, the purpose of Section 1983 is *thwarted* by affording absolute immunity.

Qualified immunity would strike the proper balance. Officials who were truly acting in good faith would not be required to predict the law at their peril. Their risk would be no greater than any other official afforded qualified immunity. The plaintiff would be required to demonstrate well-established constitutional rights and evidence of unreasonableness. At the same time, those officials who chose to be unfaithful to their oath of office would, appropriately, be accountable. With absolute immunity, officials with an impure heart could -- and would -- thumb their noses at the Constitution, and hide behind immunity. Attorneys for municipalities and counties all over America go into courtrooms every day to defend the actions of local officials. When the local officials have acted wrongfully, they should be in the courtroom with the attorneys.

### C. Absolute Immunity To Local Legislators Creates An Imbalance And Inequity

Police officers are only afforded qualified immunity in an action for enforcement of an unconstitutional law. In a recent case in federal district court in New York, the court denied immunity to police officers who enforced an unconstitutional law which violated freedom of expression.

The officers argued they were charged with enforcing laws on the books, which they could not control. The Court acknowledged this fact, but still concluded:

In this case, the law made it clear that the Village ordinance violated the First Amendment. Enforcement of the ordinance in the light of substantial precedent establishing its invalidity was at least arguably unreasonable. Because they are unable to establish the absence of an issue of fact as to the objective legal reasonableness of their actions, defendants are not entitled to qualified immunity on this claim. *Nichols v. Village of Pelham Manor*, --- F.Supp. ---, 1997 WL 436489 at 14 (S.D.N.Y., 7/31/97).

Even if the law is found in the end to be constitutional, the police officer can be sued, and the only immunity he can raise is qualified immunity. *Grossman v. City of Portland*, 33 F.3d 1200 (9th Cir. 1994). With qualified immunity, the officer may often be found not liable, and may be dismissed from the action on a *Harlow* motion. However, if the plaintiff is able to demonstrate the constitutional right was clearly established, and the officer acted unreasonably, the officer can be held to answer to a jury in a Section 1983 action.

If the police officer who is enforcing the law can be held accountable, public policy strongly demands that the legislator who passed the law also be held accountable. Consider the differences in the authority, pay, benefits and influence available to these two positions. An untenable imbalance is created by affording local legislators absolute immunity for legislative acts which are unconstitutional.

Further, if a local legislator acts unconstitutionally, he can expose the municipality to liability for damages. *Berkley v. Common Council of City of Charleston*, 63 F.3d 295 (4th Cir. 1995). If a local legislator can expose the municipality to damages -- which means he is exposing the treasury of the people to damages -- how can he be said to be acting by and for the people? Why should the local official be excused for his intentional constitutional wrongs when no one else is immune *for his* actions?

### CONCLUSION

The highest calling of public service is to protect the disenfranchised. The substance of the federal Constitution is protection of the weak and unpopular. These notions, upon which this country was built, have become extremely fragile in this era of sophisticated legal maneuvering on behalf of government officials.

Local legislators are not left to languish, in the dark about what they can and cannot do constitutionally. The adverse impacts on a few of a proper law passed for the good of many are not at issue in this case. Good faith efforts to struggle with sometimes seemingly complex constitutional issues are not at issue in this case. What is at issue, instead, is whether the Court will require that those who swear to an oath to defend the Constitution be held accountable for an intentional and purposeful failure to do so. Particularly when this failure is precipitated by such base motives as money, political popularity or personal spite.

In this nation's history perhaps there were periods when local officials needed the protection of absolute immunity. Those times are a thing of the past. The savvy politician holding office at the city and county level today is not in need of, or entitled to, this degree of protection. A fair balance, between protecting constitutional rights and ensuring local legislators are able to effectively perform when acting in good faith, is found in qualified immunity.